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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, and
CSX TRANSPORTATION, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the ICC's recent and judicially-affirmed authority from the court of appeals to review certain labor arbitration awards, constitutes a sufficient "change in law," without more, for the ICC to now require arbitration of other matters previously decided by the ICC in the first instance without arbitration.

2. Whether the ICC may depart from a clear and unambiguous interpretation of its own regulations, based upon a claim of inconsistency with its asserted intent (but not the wording) of another of its regulations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, American Train Dispatchers Association, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINIONS BELOW

The majority opinion (App. A, 1a-21a) and dissenting opinion (App. A, 22a-29a) are reported at *American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842 (D.C. Cir. 1995). An earlier opinion dealing with agency finality (App. A, 35a-38a) is reported at *American Train Dispatchers Ass'n v. ICC*, 949 F.2d 413 (D.C. Cir. 1991).

The Interstate Commerce Commission (ICC) issued three opinions. The first (App. B, 39a-45a) and second (App. B, 46a-49a) are unreported; the third and final decision (App. B, 50a-61a) is reported at *Amer. Train Dispatchers Assoc. v. CSX Transp., Inc.*, 9 I.C.C. 2d 1127 (1993).

Th arbitration committee's opinion and award, *In the matter of Arbitration Between American Train Dispatchers Association and CSX Transportation, Inc.*, (App. C, 62a-84a), is unreported.

JURISDICTION

The majority and dissenting opinions of the court of appeals (App. A, 1a-29a), and the judgment (App. A, 30a), were entered May 19, 1995. The court of appeals denied rehearing (App. A, 31a), and suggestion for rehearing in banc (App. A, 32a), on July 21, 1995. Chief Justice Rehnquist on October 9, 1995 in Application No. A-318 (App. A, 33a-34a) extended the time within which to file a petition for writ of certiorari to and including November 18, 1995.*

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). *See also:* 28 U.S.C. 2101(c).

STATUTE AND REGULATION INVOLVED

The statute primarily involved is 49 U.S.C. 11347, which imposes mandatory protection for railroad employees involved in certain transactions:

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*This falls on a Saturday, which extends to and including November 20, 1995. Rule 30.1. Stern R.L., et al, *Supreme Court Practice*, 273 (7th Ed. 1993).

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 of section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under sections 24307(c), 24312, and 24706(c) of this title. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period.).

The regulation primarily involved is Article I, § 5(a) of the so-called *New York Dock (NYD)* conditions, first two paragraphs, set forth in *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60, 86 (1979), *aff'd sub. nom. New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir. 1979):

> 5. *Displacement allowances.* — (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement

allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

STATEMENT OF THE CASE

1. *Jurisdiction.* The jurisdiction of the court of appeals over final orders of the ICC is conferred by 28 U.S.C. 2342(5). Jurisdiction to review ICC affirmance of arbitration awards issued under Art. I, § 11, of *New York Dock* is sustained by *International Broth. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988).

2. *Factual Setting.* CSX Transportation, Inc. (CSXT) on September 1, 1987, announced plans to consolidate train dispatching at Jacksonville, FL commencing on and after May 2, 1988. An implementing agreement between ATDA and CSXT to govern the transfer was made January 9, 1988. (App. B, 39a-40a). CSXT's desire for rapid implementation of the Jacksonville, FL coordination required dispatchers taking jobs at the new location to relocate to Florida and undergo training on a new computerized dispatching system, in many cases

before their former duty stations had closed. As a result, vacancies and personnel shortages occurred in a number of offices during the transfer period, and a number of dispatchers who remained behind were required to perform overtime. The terms of the ATDA/CSXT agreements mandate dispatchers to work overtime — it is not an elective matter for the employee. (App. A, 3a).

Railroad employees forced to transfer as a result of an ICC-approved or and ICC-exempted transaction are guaranteed their former earnings for a maximum period of six years. This guarantee is part of the *New York Dock* (*NYD*) conditions. Art. I, § 5(a) of *NYD* provides a formula, patterned after the Washington Job Protection Agreement of 1936, whereby an average monthly compensation statement is prepared for each employee. The 12 months immediately preceding an employee's displacement is prescribed as the test period. The average compensation is used for displacement allowances, and for the administration of other benefits under *NYD*. (App. B, 46a-47a; App. C, 64a).

The average monthly compensation is determined by computing the employee's *total compensation received* and *total time paid for* during the *last 12 months* immediately preceding his displacement. The terms *total* compensation, *total* time, and *last 12 months* are unequivocal. The provisions of Art. I, § 5(a) are clear on this point, *supra*:

> "Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby produc-

> ing average monthly compensation and average monthly time paid for in the test period) . . ."

But CSXT did not follow the *New York Dock* Art. I, § 5(a) formula for train dispatchers involved in the Jacksonville transfer. Instead of a 12-month period immediately preceding a train dispatcher's displacement, CSXT took the 8-month period ending January 31, 1988, and "total compensation" was not applied as ordinarily understood, but excluded compensation in excess of "normal" hours during the 8-month test period. ATDA challenged CSXT's use of the new formula for some 250 train dispatchers involved in the transfers to Jacksonville, FL.

3. *Initial ICC Decisions.* ATDA filed its complaint against CSXT at the ICC for the proper preparation of the average monthly compensation statements. ATDA's action was filed under 49 US.C. 11347 and Art. I, § 5(a) of *NYD.* Traditionally, the ICC itself considers complaints involving employee compensation guarantees. However, in its two decisions dismissing ATDA's complaint, served June 25, 1990 (App. B, 39a) and November 19, 1990 (App. B, 46a), the ICC ruled that the matter first should be referred to arbitration, and then subject to review by the ICC.

The basis for the change was given by the ICC as due to the decision of the court of appeals in *International Broth. of Elec. Workers v. ICC,* 862 F.2d 330 (D.C. Cir. 1988), which affirmed the ICC's first announced authority to review arbitral awards.[1] (App. A, 6a-8a, App. B, 48a).

ATDA challenged the ICC's action in remitting its complaint to arbitration. The Court of Appeals dismissed ATDA's petition for review for lack of a final ICC order, stating the issue of

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[1] *Chicago & North Western Tptn. Co. - Abandonment,* 3 I.C.C.2d 729 (1987).

being remitted to arbitration can be raised later. (App. A, 38a). *American Train Dispatchers Ass'n v. ICC*, 949 F.2d 413, 415 (D.C. Cir. 1991).

4. *Final ICC Decision*. ATDA invoked arbitration pursuant to the 1991 opinion of the Court of Appeals, in accordance with Art. I, § 11 of *NYD*, 360 I.C.C. at 87-88.[2]

The arbitration committee ruled on the asserted claim by one train dispatcher, to provide guidance for numerous other disputes involving the CSXT formula. (App. C, 63a). The committee traced the history of Art. I, § 5(a), *NYD*, back to the Washington Job Protection Agreement of 1936, and said that early awards by arbitrators interpreted the language literally, but that recent awards (with exception) require that transaction-related overtime be excluded from the average monthly compensation statements. (App. C, 76a, 80a) On August 31, 1992, the committee ruled, with the labor member dissenting, that CSXT properly calculated the monthly compensation statement for the individual train dispatcher. (App. C, 80a). ATDA appealed the arbitration committee's award to the ICC.

The ICC on November 2, 1993 affirmed the arbitration award. *Amer. Train Dispatchers Assoc. v. CSX Transp., Inc.* 9 I.C.C.2d 1127 (App. B, 50a). The ICC adopted as its standard for review the limited criteria of the so-called *Steelworkers Trilogy*,[3] *i.e.*, awards are not vacated because of substantive mistake, except where there is egregious error, when the award fails to draw its essence from the labor protective conditions, or when the arbitrator exceeds the specific limits on

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[2]Disputes involving an implementing agreement to carry out a transaction are governed by a different resolution procedure, *i.e.*, Article I, Section 4 of *NYD*, and are excluded from Article I, Section 11.

[3]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

his authority. 9 I.C.C.2d at 1130-31. (App. B, 54a). However, the ICC said it is entitled to subject an arbitration award to "more searching review" when an interpretation of the ICC's labor conditions are involved, citing *Railway Labor Executives' Ass'n v. U.S.*, 987 F.2d 806, 812 (D.C. Cir. 1993). 9 I.C.C.2d at 1131. (App. B., 54a-55a).

The ICC ruled that if a provision in dispute is ambiguous or contrary to other provisions, consideration of the underlying policies and purposes of a statute, rule, or contract is proper. The ICC found that the terms "total compensation" and "total time," if applied literally would be contradicted by the overall policy of *NYD*, which the ICC's decision stated was to protect employees only against losses caused by the transaction. The ICC pointed to *NYD*, Art, I, § 1(b), definition of "Displaced employee," as the contrary provision. 9 I.C.C.2d at 1134. (App. B, 59a).

5. *Courts of Appeals' Opinions*. The majority and dissenting opinions by the court of appeals are sharply divided. The court's opinion, by Judge Rogers, sustained the ICC's referral of the average monthly compensation statement dispute to arbitration, reasoning that judicial affirmance of the ICC's review of arbitration awards in *International Broth. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988), constituted a "change in the law" so that the ICC could now remit certain cases to arbitration which previously had been determined as an initial matter by the agency. (App. A, 6a-8a).

The Court's opinion next ruled that the *NYD* conditions were agency regulations — not statutory terms — so that the court will defer to the ICC's interpretation where the meaning is not free from doubt. (App. A, 8a-11a). The remainder of the court's opinion dealt with the matter whether the meaning of Art. I, § 5 (a) of *NYD* is doubtful or ambiguous. (App. A, 11a-21a). The court ruled that the formula set forth in § 5(a) appears clear, yet when viewed in the context of the

overall scheme of *NYD*, the formula is at a variance with the literal interpretation, such that it is appropriate to determine whether the literal interpretation "makes sense" in the context of *NYD* as a whole. (App. A, 11-12).

The court of appeals found a contrasting purpose in Art. I, § 1(b) of *NYD*, 360 I.C.C. at 84, defining "displaced employee," which means an employee, who, as a result of the transaction is placed in a worse position with respect to his compensation and rules governing his working conditions. The court said the language of Art. I, § 1(b) reflects an intention underlying the conditions that employees are no worse off after a consolidation than had the consolidation never taken place. The opinion adds that the exculsion of transaction-related overtime reasonably comports with the context and purposes of the conditions as a whole. (App. A, 13a-14a).

The dissent of Judge Wald was predicated upon the rule that an agency's interpretation of its own regulation is not controlling if "plainly erroneous" or "inconsistent with the regulation," citing *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386 (1994), and other opinions dealing with agency interpretation of its own regulations. (App. A, 22a & n.1.) The dissent found that § 5(a) of *NYD* sets out a clear and straight forward fixed formula for calculating a displacement allowance. Like any other fixed formula for calculating benefits based on time worked, it may in some few cases produce arguable overly generous or not generous enough results. The opinion set forth the formula of Art. I, § 5(a). (App. A, 23a):

> "The formula works like this. Begin with the date of the employee's displacement, and use the preceding twelve months as the "test period." To determine "average monthly compensation," take the employee's *total* compensation received during the 12-month test period, and divide by 12. Similarly,

> to determine "average monthly time paid for," take the *total* time for which the employee was paid during the 12-month test period, and divided by 12."

The dissent concluded it is hard to find anything ambiguous. (App. A, 23a):

"It is hard to find anything ambiguous there; ordinary terms like "total compensation," "total time," and "12 months," coupled with elementary arithmetic, produce a predictable amount in all cases."

The dissent ridiculed the ICC and majority substitution of the 8-months "normal" standard for the literal language of Art. I, § 5(a). (App. A, 24a):

> "Despite the lucidity of the formula and its acknowledged potential in some cases for producing atypical results, in either the employer's or employee's direction, it is argued that we should engage in its extensive reconstruction when a "literal" application would work against the employer's interests. In such cases, the Commission and the majority say, "total compensation" should be construed not to mean *total* compensation as that term is ordinarily understood (i.e., *all* the compensation an employee receives in the specified period), but instead something akin to "all the compensation the employee receives in the test period, except compensation for any hours in excess of the employee's 'normal' hours." "Normal" hours are not to be determined solely by reference to the 12-month "test period" specified in the § 5(a) formula; instead, a second, 8-month measuring period, prior to the "transaction" is used as the norm. Any hours in the 12-month "test period" in excess of the employee's "normal" hours as determined from

> this 8-month measuring period, nowhere mentioned in § 5(a), are presumed to be "transaction-related," and are deducted from the employee's "average monthly hours worked." That second figure, multiplied by the employee's base rate of pay during the 12-month test period, becomes the new "average monthly compensation," and the basis upon which the employee's displacement benefits are calculated. *See American Train Dispatchers Ass'n v. CSX Transportation, Inc.*, 9 I.C.C.2d 1127, 1129 & n.6 (1993) (describing methodology)."

The dissent pointed to the majority's reliance upon the definition of "displaced employee" in § 1(b) to claim § 5(a) is ambiguous, and answered that the narrow definition of § 1(b) is designed only to identify the class of employees eligible for benefits, whereas the § 5(a) formula is designed to measure the benefits to which the displaced employees are entitled; it is mixing apples and oranges to use the definition of who is a displaced employee to narrow the plain language of how to calculate the benefits due such a person. (App. A, 26a):

> "I can, in short, find no inconsistency or even tension between § 1(b) and § 5(a), certainly nothing sufficient to render the plain language of § 5(a) ambiguous."

The dissent concluded that there are no grounds on which to distinguish between transaction-related and unrelated overtime, since any overtime earnings above a historical average would give the employee a six-year "windfall" arguably inconsistent with the purposes of *NYD*. (App. A, 27a). Further, previous arbitration awards excluding transaction-related overtime, seem based on policy grounds counter to the results unambiguously mandated by Section 5(a). (App. A, 29a).

The court of appeals denied rehearing, and suggestion for rehearing in banc. (App. A, 31a-32a).

REASONS FOR GRANTING THE WRIT

This case is of exceptional importance. The United States Court of Appeals has decided an important question of federal law that should be decided by this Court, and has decided a federal question in a way which conflicts with relevant decisions of this Court.

I. THE COURT OF APPEALS HAS IMPROPERLY EXPANDED THE TYPE OF CASES WHICH THE ICC MAY REFER TO ARBITRATION TO THE PREJUDICE OF RAILROAD EMPLOYEES; THIS IS AN IMPORTANT DEVELOPMENT WHICH SHOULD BE DECIDED BY THIS COURT

The ICC in its *first* decision recognized that the agency will itself determine statutory minimum and compensation guarantee questions, rather than remit the parties to arbitration, citing *Norfolk and Western R. Co. v. Nemitz*, 404 U.S. 37 (1971), *Leavens v. Burlington Northern*, 348 I.C.C.962 (1977) and other decisions. (App. B, 42a-43a). *See also: Landis v. Burlington Northern R. Co.*, 930 F.2d 748, 751-52 (9th Cir. 1991).[4] The determination of the average monthly compensation statement under Art. I, § 5(a) is certainly a com-

[4]The ICC listed representative types of disputes, other than over compensation guarantees, statutory minima, and eligibility, which will be subject to arbitration in the first instance. *First Decision* (App. B, 42a-43a). Of course, disputes over the content of implementing agreements, arising under a different provision of *NYD*, Art. I, § 4, to carry out ICC-approved or ICC-exempted carrier consolidations, are subject to mandatory arbitration with subsequent ICC review. *United Transp. Union v. Norfolk and Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. den.* 484 U.S. 1006; *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117

pensation guarantee question, and is also a statutory minimum matter.

The ICC (*Second decision*, App. B, 48a) and the court of appeals (App. A, 6a-8a), sustained the ICC's change in position, so as to now require initial arbitration of compensation guarantees and statutory minimum questions, based upon a "change in law" brought about by *International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*IBEW*). But *IBEW* merely held that where the ICC does properly refer a matter to arbitration, the agency may review the resultant award. *IBEW* did not expand the class of disputes which the ICC may refer to arbitration.

The reliance upon *IBEW* by the ICC and the court of appeals to expand the class of disputes referable to arbitration, predicated upon the ability to appeal the resultant arbitration award to the ICC, is simply a bureaucratic response. It serves to expand the role of labor arbitrators, as well as to greatly increase the cost of dispute resolution. Dispute resolution is now a two-step process, replacing the single ICC forum.

The requirement for prior arbitration of compensation guarantees and statutory minima does not merely place the employee and his bargaining agent at considerable additional expense and litigation delay, for substantive rights also are altered. The arbitration award is not subject to the same scope of review by the ICC as if the ICC itself had decided the matter. This is because the scope of review for an arbitration award is very narrow, and will not be set aside for substantive mistake, as the ICC acknowledged. 9 I.C.C.2d at 1130-31 and n.7. However, if a compensation guarantee or statutory minima case is initially determined by the ICC itself, the full reach of the Administrative Procedure Act is available. (App. B, 54a-55a).

(1991); *United Transp. Union v. U.S.*, 905 F.2d 463 (D.C. Cir. 1990); *Railway Labor Executives' Ass'n v. U.S.*, 987 F.2d 806 (D.C. Cir. 1993).

The example of J.P. Barr, the sole representative train dispatcher selected for dispute resolution by the ICC (9 I.C.C.2d at 1131, 1133 (App. B, 55a-57a-58a)) and by the court of appeals (App. A, 41 n.3, 5-6), is illustrative. Mr. Barr's average earnings for the 8-month test period were incorrectly computed by CSXT as $2,898.49, instead of a higher $3,163.14, as shown by the dissenting member of the arbitration panel. (App. C, 83a). This and other factual issues were not reviewed by the ICC due to the limited scope of review for an arbitration award. If the Barr case had been subject to initial ICC action, the matter would have been subject to review under the Administrative Procedure Act, 5 U.S.C. 551-9, 701-6; and instead of an arbitrator appointed by the National Mediation Board, there likely would be an Administrative Law Judge appointed by the ICC or other evidentiary procedures.

Since it is the court of appeals which has created the new road to arbitration, in lieu of direct ICC decision-making, it is respectfully suggested the Supreme Court should grant certiorari to the end of a proper administration of the role of the federal courts.

The issue is of extreme practical importance. The railroad industry is in the process of consolidations. Employees should have a prompt resolution of disputes involving determination of their average monthly compensation statements.

II. THE MAJORITY OPINION OF THE COURT OF APPEALS CONFLICTS WITH THE OPINIONS OF THIS COURT ON AGENCY INTERPRETATION OF AN AGENCY'S OWN REGULATIONS; THE DEVIATION IS SEVERE AND WARRANTS PLENARY REVIEW.

The majority opinion for the court of appeals recognizes that the meaning of Art. I, § 5(a) is "clear," and "admits of little or no ambiguity." (App., A, 12a):

> On its face, the formula set forth in § 5(a) appears clear: the displacement allowance shall be calculated by reference to "total" time worked and "total compensation" received over the twelve month test period. The language suggests that all earnings, including payments for overtime performed in connection with the consolidation, would be included in calculating the test period average and thereby used as a baseline to determine the employee's compensation throughout the six-year protected period. Viewed in isolation, therefore, this provision would appear to admit of little or no ambiguity.

But the majority then reasons that the ICC may ignore the literal or plain meaning of its own regulations since such an interpretation would be contrary to the asserted overall policy of *NYD* as indicated by the ICC's definition of "displaced person," see dissent at App. A, 25a-26a. In short, the majority would override the clear and unambiguous meaning of section 5(a) by the asserted intent (not clear meaning) of section 1(b).

The majority confuses the standard for agency interpretation of a statute, with the standard for agency interpretation of its own rules. The majority asserts judicial precedent supports it position that an agency may depart from the literal meaning of its own regulations to avoid apparent conflict with the agency's regulatory scheme. (App. A, 13a-15a).

1. *Circuit decisions.* The majority cites two decisions, *ASTV v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995), and *Tataranowicz v. Sullivan*, 959 F.2d 268, 275-80 (D.C. Cir. 1992), *cert. den.* 113 S.Ct. 963 (App. A, 12a-13a). But these citations involve agency interpretation of a statute, not an agency interpretation of its own regulations on the ground two agency regulations are inconsistent.

2. *Supreme Court Decisions*. The majority opinion's primary reliance upon the decision in *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989), appears perverse. (App. A, 13a). The majority has seriously misquoted the text. There is no reference by the Supreme Court to inclusion of regulatory terms or regulatory intent in the same standard as would govern agency interpretation of a statute. The court of appeals majority incorrectly quotes the Supreme Court's opinion. (App. A, 31a):

> *see also Public Citizen v. United States Dept of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory (or regulatory) scheme would compel an odd result, we must search for other evidence of congressional (or regulatory) intent to lend the term its proper scope.") (internal quotation marks and citations omitted).

The correct text of the Supreme Court's opinion does not refer to a *regulatory* term or a *regulatory* intent. Moreover, the Supreme Court's opinion uses the word "term" at both the beginning and at the end of the sentence, rather than "scheme" and "term." 491 U.S. at 454:

> Where the literal reading of a statutory term would "compel an odd result," *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989), we must search for other evidence of congressional intent to lend the term its proper scope.

The majority's misquotation serves to change the clear language and thrust of the Supreme Court's opinion.

Elsewhere, the majority in a footnote, makes reference to two Supreme Court cases[5] for the proposition that ambiguity

[5] *McCarthy v. Bronson*, 500 U.S. 136 (1991); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

may be found where a facially clear provision would conflict with statutory design or a regulatory scheme. But the two citations do not involve agency interpretation of an agency's own regulations. (App. A, 13a n.12).

Finally, the majority asserts that the plain language meaning of Art. I, § 5(a) of *NYD* violates the principle that a regulatory interpretation must be consistent with the regulatory scheme, citing *Northern Ind. Pub. Servc. Co. v. Walton League*, 423 U.S. 12, 15 (1975). (App. A, 15a). Again, the short answer is that the majority has misread the Supreme Court's opinion, for throughout the Supreme Court refers to the *wording* of the regulations, not the "scheme," in support of a preference for examining the language of a regulation. 423 U.S. at 14:

> That interpretation is supported by the wording of the regulations and is consistent with prior agency decisions.

See also: 423 U.S. at 15, "purpose and wording of the regulations."

The court of appeals had made serious misquotations and misstatements of the Supreme Court's opinions. Petitioner brought this matter to the attention of the court of appeals by way of petition for rehearing, etc., but the majority opinion was not altered or amended. The Supreme Court should use its supervisory power in this instance.

3. *Dissenting Opinion.* The dissenting opinion (App. A, 22a-29a) sets forth the correct standard by which to measure an agency's interpretation of its own regulation. A reviewing court should strike down an agency's interpretation of its own regulation if "plainly erroneous" or "inconsistent with the regulation," citing *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386 (1994), and other Supreme Court decisions. (App. A, 22a, n.1)

There is nothing erroneous or inconsistent with the language of Art. I, § 5(a) of *NYD*. The period of 12 months means 12 months, not 8 months as used by CSXT and upheld by the ICC. Similarly, "total compensation" means all compensation, not as adjusted in an arbitrary attempt to eliminate required overtime. The dissent correctly points out it is just that a "literal" meaning of the ICC's regulations would work against the carrier in this instance. (App. A, 24a):

> Despite the lucidity of the formula and its acknowledged potential in some cases for producing atypical results, in either the employer's or employee's direction, it is argued that we should engage in its extensive reconstruction when a 'literal' application would work against the employer's interests.

The dissenting opinion correctly deals with the majority's concern with the *NYD* definition of "displaced person," Art. I, § 1(b) (App. A. 25a-26a). There is no question that the dispatchers whose jobs were lost or downgraded by the consolidation were "placed in a worse position," however Art. I, § 5(a) is interpreted, and thus there is no inconsistency between §§ 1(b) and 5(a). (App. A, 26a):

> Although § 1(b) reflects a general purpose behind the *New York Dock* conditions - to assist "displaced employees" by providing them with displacement benefits - it says nothing about how *much* assistance these employees should receive (fn. omitted); that amount is plainly set out in the formula in § 5(a). I can, in short, find no inconsistency or even tension between § 1(b) and § 5(a), certainly nothing to render the plain language of § 5(a) ambiguous.

The dissenting opinion correctly points out there are no grounds on which to distinguish "transaction related" overtime from unrelated overtime during the test period, and there is no principled ground on which to deny an override of § 5(a) anytime a "windfall" comes the way of either the employer or the employee. To make such a distinction would defeat the purpose of the § 5(a) formula entirely, leaving the ICC with discretion in every individual case to decide whether the prescribed 12-month test period is truly representative of "normal" earnings. (App. 26a-27a). Moreover, it is a greater departure from the purposes of *NYD* to adjust for transaction-related overtime than to adjust for unrelated overtime. (App. A, 27a):

> I can foretell no grounds on which to distinguish between transaction-related and unrelated overtime, since ***any*** overtime earnings above a historical average would give the employee a six-year "windfall" arguably inconsistent with the purposes of *New York Dock*. Indeed, one might think it is more unjust - and farther from the purposes of the *New York Dock* conditions - to reward employees with "windfalls" for extraordinary overtime ***unrelated*** to the transaction since such circumstances are presumably more difficult for the employer to foresee and control than transaction-related overtime in a 12-month test period immediately prior to the employee's displacement.

The majority and dissenting opinions have had a very disturbing effect upon carrier employees. Not only are some 250 train dispatchers directly affected, who must seek individual relief through arbitration and ICC review, but the impact of the decision is national in scope throughout the railroad industry. A rigid formula long considered fixed and determined, has now been opened up for settlements on an individual basis to the detriment of employee morale.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinions and judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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November 20, 1995

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 27, 1995 Decided May 19, 1995

No. 94–1036

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

CSX TRANSPORTATION, INC.,
INTERVENOR

On Petition for Review of an Order of the
Interstate Commerce Commission

Gordon P. MacDougall argued the cause and filed the briefs for petitioner.

Judith A. Albert, Attorney, Interstate Commerce Commission argued the cause for respondents. With her on the brief

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

were *Henri F. Rush*, General Counsel, *John J. McCarthy, Jr.*, Associate General Counsel and *Virginia Strasser*, Attorney, Interstate Commerce Commission; *Anne K. Bingaman*, Assistant Attorney General, *John J. Powers, III* and *Robert J. Wiggers*, Attorneys, United States Department of Justice.

James S. Whitehead argued the cause for intervenor. With him on the brief was *James D. Tomola*.

Before WALD, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* ROGERS.

Opinion dissenting in part filed by *Circuit Judge* WALD.

ROGERS, *Circuit Judge:* Petitioner American Train Dispatchers Association (the "Union") seeks review of three orders of the Interstate Commerce Commission concerning the interpretation of Article I, § 5(a) of the *New York Dock* conditions, designed to protect employees affected by railroad consolidations. The Union challenges both the Commission's initial orders requiring submission of the dispute to arbitration, and the Commission's affirmance of the arbitrator's decision that the carrier had properly excluded transaction-related overtime earnings in calculating the employees' displacement allowance. We conclude that the Commission's interpretations are permissible and therefore deny the petition for review.

I.

The Interstate Commerce Act (the "ICA") vests the Commission with exclusive authority to examine, condition, and approve proposed rail carrier mergers and consolidations. 49 U.S.C. §§ 11341–11351 (1988). The ICA also requires the Commission to impose on such mergers certain labor-protective conditions, which are designed to shield railroad workers from the adverse effects of industry upheaval. *See* 49 U.S.C. § 11347; *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 132–33 (1991). To comply with § 11347, the Commission has announced a comprehensive set of arbitration procedures and employee bene-

fits, known as the *New York Dock* conditions, that apply to railway job consolidations. *See New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, 84–90 (1979) ("*New York Dock*"), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

One condition imposed by *New York Dock* requires railroads to compensate its employees who are adversely affected by a Commission-approved consolidation. Under *New York Dock*, Article I, § 5(a), the carrier must replace the lost wages of such employees for up to six years following a consolidation or merger. *See New York Dock*, Art. I, § 5(a), 360 I.C.C. at 86 (quoted *infra* at pp. 11–12). In each month during the protected period, the employee is entitled to a displacement allowance equal to the difference between the employee's actual earnings and the "average monthly compensation" earned during a test period prior to the consolidation.

In 1987, CSX Transportation, Inc. announced a plan to consolidate its train dispatching operations into a single facility in Jacksonville, Florida. *See American Train Dispatchers Ass'n v. CSX Transp., Inc.*, 9 I.C.C.2d 1127, 1128–29 (1993) ("*Third Order*"). The Union and CSX entered into an Implementing Agreement in January 1988 to govern the consolidation; the terms of the Agreement entitled employees to the protective benefits of *New York Dock*. The plan required dispatchers taking jobs at the new location to relocate to Florida and undergo training on a new computerized dispatching system, in many cases before their former duty stations had closed. As a result, vacancies and personnel shortages existed in a number of offices during the transfer period, and a number of dispatchers who remained behind logged unusual amounts of overtime. The terms of their employment required dispatchers to work overtime when necessary.

Pursuant to *New York Dock*, CSX prepared average monthly compensation statements for approximately 250 dispatchers who were displaced during the first phase of the reorganization. In computing the test period average, the carrier deducted the overtime earnings that were traceable to

the consolidation transaction, maintaining that the labor protective conditions did not require inclusion of such extraordinary earnings.[1] The Union objected to the deductions and filed a complaint with the Commission, seeking an order requiring CSX to include the transaction-related overtime earnings in the average compensation figure. The Commission dismissed the complaint in favor of initial resolution through arbitration under *New York Dock*, Article I, § 11. *See American Train Dispatchers Ass'n v. CSX Transp., Inc.*, Fin. Doc. No. 28905 (Sub–No. 24) (served June 25, 1990) ("*First Order*"). Over objection, the Union submitted its claims to arbitration.[2]

An arbitral panel decided that CSX had properly excluded the dispatchers' transaction-related overtime.[3] The panel determined that neither Congress nor the Commission had clarified the meaning of "total compensation," instead leaving it to arbitrators to interpret the term on a case-by-case basis.

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[1] To identify transaction-related overtime, CSX compared an employee's average hours worked each month during the twelve month test period with that employee's average monthly hours during an eight month period ending January 31, 1988, just prior to the commencement of the consolidation. Using this control period to determine whether the employee's overtime hours had been inflated during the test period, CSX then deducted the "excess" hours from the test period's average monthly hours, and reduced the average monthly earnings by the straight-time earnings rate associated with the excess overtime. *See Third Order*, 9 I.C.C.2d at 1129 n.6.

[2] The Commission denied the Union's petition for rehearing. *See American Train Dispatchers Ass'n v. CSX Transp., Inc.*, Fin. Doc. No. 28905 (Sub–No. 24) (served Nov. 19, 1990), and the court dismissed as premature the Union's subsequent petition for review of the Commission's orders to arbitrate because the orders were non-final. *See American Train Dispatchers Ass'n v. ICC*, 949 F.2d 413 (D.C. Cir. 1991).

[3] The arbitral panel focused on the representative claims of a single dispatcher, John P. Barr, with the intention that resolution of his claims would provide guidance to the parties with respect to similarly situated employees.

Reviewing previous arbitration decisions under the various precursors to *New York Dock*, the panel found that the preponderance of arbitral precedents had adopted the position urged by CSX. Over the dissent of the Union member, the panel majority concluded that a contrary interpretation would create an unintended windfall for employees throughout the six year protective period—a result inconsistent with the labor conditions' limited purpose of protecting employees from suffering adverse effects to their normal earnings as a result of the transaction.

The Commission denied the Union's appeal of the arbitration decision. *See Third Order*, 9 I.C.C.2d at 1128. Noting that its general scope of review for arbitral awards is highly deferential, the Commission acknowledged that "when reviewing an arbitrator's interpretation of the Commission's labor conditions, the agency is entitled to subject it to 'more searching review.'" *Id.* at 1131 (citing *Railway Labor Exec. Ass'n v. United States*, 987 F.2d 806, 812 (D.C. Cir. 1993)). The Commission then affirmed the award on the ground that a literal interpretation of § 5(a) conflicted with other provisions in the *New York Dock* conditions as well as the conditions' "overall policy ... that employees be protected only against those losses that are caused by the transaction." *Id.* at 1134.

The Commission also rejected the Union's challenges to the representative use of Mr. Barr's claim, *see supra* note 3, and to the method by which CSX calculated the amount of transaction-related (and thus excludable) overtime, *see supra* note 1. The Commission emphasized that its review of the arbitral award was concerned solely with whether transaction-related overtime could be properly excluded under *New York Dock*, and that for that purpose the focus on Mr. Barr was appropriate. *See id.* at 1133. With respect to the methodology CSX used to identify and exclude transaction-related overtime, the Commission generally approved the use of a pre-transaction control period to establish a baseline level of overtime hours that could then be compared with overtime hours accrued in the course of the transaction. *Id.* at 1135. At the same time, however, the Commission noted that the

transaction-related nature of the overtime was undisputed in Mr. Barr's case, and twice acknowledged that other displaced employees could challenge the carrier's calculation with respect to their own overtime earnings. *See id.* at 1133, 1135.

II.

In remitting the Union's dispute with CSX to arbitration, the Commission recognized that "the Commission itself has considered, as a general matter, whether the compensation received by employees satisf[ies] statutory minimum levels." *First Order* at p. 3. It nevertheless concluded that the dispute with CSX was appropriate for initial arbitration because it involved individual claims about "the calculation of individual benefits," where an arbitrator's expertise would be valuable. *Id.* at pp. 3–4. The Commission noted that the opportunity for Commission review would ensure consistency with *New York Dock.*

The Union does not suggest that the order to arbitrate is inconsistent with the statute or *New York Dock.*[4] Rather, the Union contends that the Commission's decision conflicts with agency policy to take initial jurisdiction over questions concerning "compensation guarantees" under labor protective conditions. The Union relies on *Great N. Pac.—Merger—Great N.*, Fin. Doc. No. 21478 (Sub–No. 6) (served Dec. 11, 1986 & April 5, 1988) (*"Landis"*), *aff'd sub nom. Landis v. Burlington N. R.R. Co.*, 930 F.2d 748 (9th Cir. 1991). *Landis* involved a claim that the carrier miscalculated a dismissal allowance provided under labor protective conditions analogous to the *New York Dock* conditions. On referral from a federal district court where the employee had initially filed suit, the Commission resolved the dispute without remitting it

[4] The court has previously observed that "[n]othing in the [ICA] either requires or forecloses the agency's use of arbitration in employee disputes." *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 336 (D.C. Cir. 1988). Moreover, *New York Dock* provides for arbitration "with respect to the interpretation, application or enforcement of any provision" of the labor protective conditions. Art. I, § 11(b), 360 I.C.C. at 88.

for arbitration, notwithstanding the fact that the conditions provided for an arbitral remedy. The Union maintains that the instant case also involves a "compensation guarantee" under labor protective conditions, and that the Commission therefore acted inconsistently when it declined to exercise initial jurisdiction.[5]

The apparent conflict with *Landis* thus raises the question whether the Commission adequately explained its departure from prior practice. *See King Broadcasting Co. v. FCC*, 860 F.2d 465, 469–71 (D.C. Cir. 1988); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *cert. denied*, 403 U.S. 923 (1971); *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 339 (D.C. Cir. 1988). In the order denying the Union's petition for rehearing, the Commission recognized the *Landis* precedent and provided reasons for its departure from that policy. *See American Train Dispatchers Ass'n v. CSX Transp., Inc.*, Fin. Doc. No. 28905 (Sub–No. 24) (served Nov. 19, 1990) ("*Second Order*"). Most significantly, the Commission noted that *Landis* predated the establishment of its judicially approved policy to refer disputes to initial arbitration prior to Commission review.[6] *Id.* at p. 2. The Commission first announced its authority to review arbitral decisions in *Chicago & North W. Transp. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) ("*Lace Curtain*"), *aff'd sub nom. International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). Prior to *Lace Curtain*, the Commission's jurisdiction to review an arbitration award had not been tested. Once approved by the court, *Lace Curtain* paved the way for more expansive use of arbitration than had been considered at the time *Landis* was decided. *See St. Louis Southwestern Ry.*, Fin. Doc. No. 28799, at p. 4 (Sub–No. 1) (May 23, 1991)

[5] The fact that the Commission characterized the Union's complaint as one seeking the resolution of claims rather than a dispute concerning a compensation or statutory minimum guarantee has no bearing on our disposition.

[6] The Commission also observed that because *Landis* was decided on referral from a federal district court, which had stayed its own proceedings pending ICC resolution of that issue, referral to an arbitrator "would not have been appropriate." *Id.* at p. 2.

(noting that "recent Commission practice is to permit an arbitrator to decide all issues, including issues that arguably could be decided by the Commission in the first instance") (citing decisions). The Commission's reliance on this change in law regarding its use of arbitrators provides the requisite reasoned explanation of its departure from the approach adopted in *Landis*, and we thus find no error in the Commission's decision to require arbitration here.

III.

The Union also contends that the Commission's interpretation of Article I, § 5(a) of *New York Dock* is arbitrary and capricious because it conflicts with the plain meaning of the term "total compensation." In the *Third Order*, the Commission agreed with the arbitration panel's decision that the overall purpose of the protective conditions foreclosed a literal reading of the displacement allowance provision. In the view of the Commission, the conditions were designed to protect employees "only against those losses that are caused by the transaction," such that the proper construction of "total compensation" necessarily excludes extraordinary earnings that would not exist but for the transaction. *Third Order*, 9 I.C.C.2d at 1134. The Commission explained that "[t]he loss of transaction-related overtime, whether voluntary or compulsory, is not a protected harm, because it is not within an employee's normal earnings expectations."[7] *Id.* at 1135.

A.

Our review of the Commission's order is limited: the court will overturn a decision of the Commission only if its findings

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[7] Although the Union has renewed its objections to the use of Mr. Barr's claim as a representative example and to the method used by CSX to factor out the employees' transaction-related earnings, the Commission could reasonably affirm these aspects of the arbitral decision. Hence we focus, as did the Commission, on the general principle concerning the exclusion of transaction-related overtime from "total compensation" used to compute the "average monthly compensation" figure in *New York Dock* § 5(a).

or conclusions are arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706; *United Transp. Union v. United States*, 905 F.2d 463, 467–68 (D.C. Cir. 1990). The parties disagree, however, about the proper level of deference owed to the Commission's order. The Commission maintains that its decision reflects a reasonable construction of its own labor conditions and thus deserves judicial deference. As a general matter, an "agency's construction of its own regulations is entitled to substantial deference" by a reviewing court. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). The Union maintains, however, that *New York Dock* simply restates the pre-existing labor standards that Congress incorporated by reference in 1976 when it amended § 11347. Thus, the Union contends that the *New York Dock* conditions should be treated as a "statutory command" and the agency's discretion to interpret them should be limited accordingly. We are unpersuaded by this argument.

As the Union notes, the provision now codified as § 11347 refers to extrinsic labor-protective conditions that existed at the time Congress amended the ICA in 1976.[8] Section 11347 provides:

> When a rail carrier is involved in a transaction for which approval is sought . . . the [ICC] shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)....

49 U.S.C. § 11347 (1988). The statute thus incorporates by reference two sets of conditions. The first set is defined as "the terms imposed under this section before February 5,

[8] The ICA provision currently codified at 49 U.S.C. § 11347 was formerly located at 49 U.S.C. § 5(2)(f). Originally enacted in the Transportation Act of 1940, § 5(2)(f) was amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, § 402(a), 90 Stat. 31, 62. *See generally New York Dock Ry.*, 609 F.2d at 90.

1976," and refers to various labor-protective conditions that the Commission had imposed beginning in 1944. These were modeled after the Washington Job Protection Agreement of 1936 ("WJPA"), a private agreement between most of the nation's railroads and railroad unions. *See, e.g., American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157, 1159–60 (D.C. Cir. 1994); *Railway Labor Exec. Ass'n*, 987 F.2d at 813. The second set of conditions, defined as the "terms established under section 405 of the Rail Passenger Service Act," refers to the so-called "Appendix C–1" conditions, which were adopted in 1971 by the Secretary of Labor to comply with the Rail Passenger Service Act of 1970.[9] With certain differences not material here, both the WJPA (and its progeny) and the Appendix C–1 conditions provide for a displacement allowance analogous to that in *New York Dock*; the formula used to calculate the test period average is functionally identical in each instance.[10]

Although this brief history helps explain the origin of *New York Dock*, it does not support the Union's contention that *New York Dock* must be treated as a statute for purposes of determining the appropriate scope of review of the Commission's order. The Commission itself crafted the *New York Dock* conditions pursuant to authority granted by Congress, and it is apparent that Congress intended to delegate that authority subject only to a floor of protection as defined by reference to the antecedent conditions. *See New York Dock Ry.*, 609 F.2d at 86–95; *see also Railway Labor Exec. Ass'n v. United States*, 339 U.S. 142, 155 (1950); *Railway Labor Exec. Ass'n v. United States*, 675 F.2d 1248, 1254–56 (D.C.

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[9] The Appendix C–1 conditions apply to certain transactions covered under the "Amtrack Act." *See* Rail Passenger Service Act of 1970, Pub. L. No. 91–518, § 405, 84 Stat. 1328, 1337 (codified at 45 U.S.C. § 565) (requiring labor protective conditions, including "provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to [the ICA]"); *see also New York Dock Ry.*, 609 F.2d at 88–89, 94.

[10] *Compare New York Dock* § 5(a) *with* Appendix C–1 § 5(a) *and* WJPA § 6(c).

Cir. 1982). The structure of § 11347, by referring to standards "at least as protective of" those extrinsic conditions, contains within it a broad measure of discretion with respect to the actual formulation of the protective conditions. Moreover, the interpretation and application of labor-protective conditions—conditions "which the Commission itself has the first responsibility to formulate and announce"—falls "within the Commission's particular area of concern and expertise." *See Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993). Because there is no suggestion that the Commission's interpretation is contrary to § 11347 (which is silent on the proper calculation of displacement allowances), we therefore review the *Third Order* with the deference applicable when an agency interprets its own orders. Under this standard, the court will defer to the Commission's interpretation where "the meaning of [regulatory] language is not free from doubt" so long as "the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC*, 499 U.S. 144, 150–51 (1991) (internal citations and quotation marks omitted); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1299–1300 (D.C. Cir. 1992) (quoting *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988)); *Secretary of Labor v. Western Fuels–Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (quoting *Southern Mut. Help Ass'n, Inc. v. Califano*, 574 F.2d 518, 526 (D.C. Cir. 1977)).

B.

Because a court may defer to an agency interpretation only where the meaning of the term is doubtful or ambiguous, *see Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984), we begin our review with the language of § 5(a). Section 5(a) provides that:

> [e]ach displaced employee's displacement allowance shall be determined by dividing separately by 12 the *total compensation* received by the employee and the total time for which he [or she] was paid during the last 12 months in which he [or she] performed services immediately preceding the date of his [or her] displacement as a

> result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period)....

Id. (emphasis added). On its face, the formula set forth in § 5(a) appears clear: the displacement allowance shall be calculated by reference to "total time" worked and "total compensation" received over the twelve month test period. The language suggests that all earnings, including payments for overtime performed in connection with the consolidation, would be included in calculating the test period average and thereby used as a baseline to determine the employee's compensation throughout the six-year protected period. Viewed in isolation, therefore, this provision would appear to admit of little or no ambiguity.[11]

Yet when viewed in the context of the overall scheme of *New York Dock*, the displacement formula's meaning is at variance with the literal interpretation. As the Supreme Court has admonished in the statutory context, that background cannot simply be ignored:

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 542–43 (1940); *see also McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context."). It is therefore appropriate for the court to extend its inquiry beyond the immediate text of § 5(a) to discern whether the literal interpretation urged by the Union makes sense in the context of the labor-protective conditions as a whole. *See American Scholastic TV Programming*

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[11] *But cf. Cardillo v. Liberty Mut. Ins. Co*, 101 F.2d 254, 255 (D.C. Cir. 1938) (interpreting the term "total compensation," as used in the D.C. Employees' Compensation Act, to exclude medical and similar benefits that the employer is required to furnish).

Found. v. FCC, 46 F.3d 1173, 1178 (D.C. Cir. 1995) ("*ASTV*"); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory [or regulatory] scheme would compel an odd result, we must search for other evidence of congressional [or regulatory] intent to lend the term its proper scope.") (internal quotation marks and citations omitted); *Tataranowicz v. Sullivan*, 959 F.2d 268, 275–80 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 963 (1993).

In *ASTV*, the court employed the traditional *Chevron* two-step framework to uphold the Federal Communication Commission's interpretation of a statute prohibiting telephone companies from providing video programming. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While acknowledging that the specific language suggested "a blanket prohibition of *all* video programming, whether transmitted by cable or not," the court nevertheless proceeded to examine the " 'language and design of the statute as a whole.' " *ASTV*, 46 F.3d at 1178 (quoting *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990)). With its inquiry thus broadened, the court determined that "Congress meant only to reach video programming via cable," and that this determination thereby rendered the term "video programming" ambiguous, at least with respect to the intended scope of the video programming bar. *Id.* at 1179. The court then deferred to the agency's otherwise reasonable interpretation.[12] We adopt a similar framework of analysis here, with the added observation that our deference to the agency's judgment is enhanced in the regulatory context.

As in *ASTV*, the design of *New York Dock* as a whole renders ambiguous the intended reach of the displacement allowance as it applies to transaction-related overtime. Par-

[12] For other cases in which courts have found ambiguity where the literal reading of a facially clear provision would conflict with the statutory design, regulatory scheme or underlying object and policy, see *McCarthy v. Bronson*, 500 U.S. at 139; *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23–24 (1976); *Tataranowicz*, 959 F.2d at 276–280.

ticularly in tension are the sweeping reference to "total compensation" in § 5(a) and the narrow definition of a "displaced employee" in § 1(b). Interpreted literally, § 5(a) would permit an employee to benefit—for the duration of the protected period—from temporary and abnormal pay fluctuations stemming directly from the transaction itself. By contrast, § 1(b) indicates a very different purpose behind the conditions. That section provides that:

> "Displaced employee" means an employee of the railroad who, as a result of the transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

New York Dock, Art. I, § 1(b); 360 I.C.C. at 84. Section 1(b) thus reflects an intention underlying the conditions to ensure that employees are no worse off (at least during the protected period) after a consolidation than they would be *had the consolidation never taken place*. It is difficult to see how this purpose could be harmonized with the displacement allowance if § 5(a) were given literal effect. In the words of the Commission, "[a]n employee does not lose, 'as a result of the transaction,' that which he would never have had but for the transaction." *Third Order*, 9 I.C.C.2d at 1134. Despite the facially plain language of § 5(a), therefore, we conclude that the scope of the compensation allowance is ambiguous in light of the conflict with § 1(b).

In addition, we conclude that the exclusion of transaction-related overtime reasonably comports with the context and purpose of the conditions as a whole. Neither the regulatory scheme nor the history of *New York Dock* suggests that a six-year windfall is consistent with the purposes of the labor conditions. Indeed, § 5(a) itself indicates that the displacement allowance was not intended to confer a windfall on affected employees. After setting forth the allowance formula, that section provides that a displaced employee who "works in any month in excess of" his test period average hours shall be paid for those excess hours only at the rate he would normally receive in his retained position. *New York Dock*, Art. I, § 5(a), 360 I.C.C. at 86. This provision prevents

an employee from leveraging his displacement allowance into a bonus wage, an effect that comports with the Commission's view of the displacement allowance. Together with § 1(b), § 5(a) thus further demonstrates that the protective conditions aim only at mitigating the hardship that certain employees would suffer as a result of a railroad consolidation. The "plain language" interpretation of § 5(a) urged by the Union would therefore violate the principle that a regulatory interpretation must be, among other things, consistent with the regulatory scheme. *See Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975).

The historical origins of railroad labor conditions also point up the dissonance between the literal meaning of § 5(a) and the purpose of *New York Dock* as a whole. As noted, *New York Dock* descends from a long line of antecedents—voluntary agreements, statutory mandates, and Commission-drafted conditions—each designed to protect railroad workers from the consequences of mergers and consolidations in the railway industry. Historically these protections were intended to cushion workers from dislocations stemming from certain railroad transactions. The essence of the protective provisions has consistently contemplated a causal relationship between compensatory benefits and economic harms resulting directly from the transaction. The function of displacement allowances in these schemes was to equalize, for a specified duration of time, a shortfall in an employee's earnings caused by a move to a less remunerative position as a result of the consolidation. Nothing in the legislative or administrative precursors to *New York Dock* suggests an intent to preserve, for the length of the protected period, abnormal or extraordinary temporary increased earnings that are an incident of the transaction itself.

Congress expressed this intent to preserve only the pre-transaction compensation status quo as early as 1933, when it passed the Emergency Railroad Transportation Act, 48 Stat. 211, 214, an act that "contemplated extensive railroad consolidations." *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 173 (1961). That temporary

statute provided for employee protection against losses *caused by the transaction:*

> Nor shall any employee ... be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

In 1936, prior to the expiration of the Emergency Act, the railroads and unions negotiated the WJPA, § 1 of which states that its benefits "are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from [railroad] coordination." Among other compensatory provisions, § 6 of the WJPA provided that "[n]o employee ... who is continued in service shall ... be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination...." Still later, in 1940 Congress enacted § 5(2)(f) of the ICA, which required the Commission to include conditions providing that "such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment."[13] 49 U.S.C. § 5(2)(f) (1976).

Nor do the conditions from which *New York Dock* is directly derived—namely, the Commission's practice pursuant to ICA § 5(2)(f), as enhanced by the Amtrack Act's Appendix C–1 conditions—reflect anything other than an intention to protect employees from economic harm stemming from the transaction. In *Southern Ry.—Control—Central of Ga. Ry.*, 317 I.C.C. 729, 730–31 (1963), the Commission stated that "[b]efore an employee is entitled to such benefits, there must be a reasonably direct causal connection between the transaction and the injury sustained." *See also Southern Ry.—*

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[13] *See Brotherhood of Maintenance of Way Employes*, 366 U.S. at 176 n.7 (citing floor comments of House conferee just prior to House vote on § 5(2)(f), assenting to statement that the term "worse position" means that "[the employee's] compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected").

Control—Central of Ga. Ry., 317 I.C.C. 557, 568 (1962) ("Both the statute and the condition mean what is literally stated; i.e., that an employee is protected against adverse effects suffered in his employment as a result of the transaction."). The Amtrack Act specified that the protective arrangements must include provisions necessary for "the protection of such individual employees against a worsening of their positions with respect to their employment." 45 U.S.C. § 565(b). Underlying each of these predecessor schemes, therefore, was a consistent intention to maintain an employee's normal earnings at the level prior to the railroad consolidation. To establish that baseline by reference to abnormal earnings traceable to the transaction rather than the employee's "normal" pre-transaction employment, as the literal interpretation of *New York Dock* would do, conflicts with the history and practical context against which *New York Dock* was crafted and must be understood.

To date, moreover, most arbitrators have adopted a construction consistent with that taken in the instant case. Both the Commission and the arbitral panel here relied in part on a line of arbitration decisions, extending back to the WJPA of 1936, that found transaction-related earnings excludable from the displacement allowance formula. This interpretive background supports the reasonableness of the Commission's interpretation in two ways: first, it shows that the Commission's present interpretation is consistent with the way in which the terms imposed under the WJPA had been generally construed when Congress amended § 11347 and when the Commission formulated *New York Dock*.[14] Second, it demonstrates that the facially clear terms used in § 5(a) had a generally accepted meaning as a matter of industry practice and custom at least by the time that the parties entered into the 1988 Implementing Agreement.

In their submissions to the arbitration panel and the Commission, the parties identified three relevant arbitration deci-

[14] The parties have identified no pre–1976 arbitral awards interpreting the displacement allowance formula set forth in the Appendix C–1 conditions.

sions dating to the pre–1976 period before Congress amended the ICA. In two cases arising under the WJPA, Referee Bernstein ruled that the displacement allowance did not contemplate compensation for extraordinary transaction-related overtime during the test period. *See Brotherhood of Ry. & Steamship Clerks v. Chesapeake & Ohio Ry. Co.*, WJPA Docket No. 62 (undated) (applying a causation principle to a 1954 coordination agreement) (*reproduced at* Joint Appendix 77–80); *Transportation–Comm. Employees' Union v. Georgia R.R.*, WJPA Docket No. 137 (undated) ("the [1962] Agreement is designed to protect employees against reduction of their normal earnings") (*reproduced at* Joint Appendix 73–76). In contrast, the Union points to a 1964 decision by Arbitrator Robertson that required the carrier to comply with the literal terms of the allowance formula. *Brotherhood of Ry. and Steamship Clerks v. Western Md. Ry. Co.*, Arb. Board No. 284 (Sept. 9, 1964) (*reproduced at* Brief for Petitioner, Addendum 1c). Although the Robertson award suggested that transaction-related overtime would fall within the terms of the displacement compensation, the Commission properly concluded that the decision is inapposite because the underlying dispute concerned overtime earnings caused by illness or vacation absences of co-workers, not overtime resulting from the transaction. Because the relevant arbitration awards prior to the adoption of the *New York Dock* conditions excluded transaction-related overtime, it can be reasonably inferred that this was the interpretation of "total compensation" adopted by the Commission when it formulated the *New York Dock* conditions.

The post-*New York Dock* arbitral interpretations submitted to the Commission have, with one exception, reaffirmed the earlier construction of the displacement formula.[15] In four

[15] *See Brotherhood of Ry. Carmen v. Burlington N. R.R.* (LaRocco, Neutral Member) (Dec. 17, 1990) (Appendix C–1 conditions) (noting that while issue of whether various types of overtime fall within "total compensation" has been arbitrated frequently with different results, the "most recent line of arbitral authority excluded overtime earnings attributable to an imminent transaction from an employee's total test period earnings") (*reproduced at* Arbitration

separate awards, chaired by two different arbitrators, the panels determined that including transaction-related overtime in the test period average would result in an unintended windfall for affected employees. In the only relevant exception identified by the Union, the arbitral panel adhered stringently to the text of the test period formula without considering the context of the protective conditions.[16] *International Bhd. of Elec. Workers v. Burlington N. R.R. Co.* (Willits, Neutral Member) (October 10, 1991) (Appendix C–1 conditions) (*reproduced at* Brief for Petitioner Addendum 6c).

Record Addendum 6, Exhibit OO); *Transportation–Comm. Int'l Union v. Missouri Pacific R.R. Co.* (LaRocco, Neutral Member) (March 1, 1988) (*New York Dock* conditions) ("While test period average earnings cannot be computed solely with straight time earnings, the term 'total compensation' in protective agreements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language.... [E]xcessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction.... The narrow exception ... is designed to prevent employees from profiting from the transaction.") (*reproduced at* Joint Appendix 36, 47–48); *ATDA v. Burlington N. R.R. Co.* (LaRocco, Neutral Member) (Jan. 9, 1987) (1966 National agreement) (*reproduced at* Arbitration Record, Addendum 6, Exhibit QQ); *ATDA v. Baltimore & Ohio R.R. Co.*, Arb. Board No. 409 (Lieberman, Neutral Member) (May 6, 1982) (finding "no basis for perpetuating the abnormal and truly windfall overtime earnings which the three claimants accrued during the six-month period immediately preceding the coordination for a five year period") (*reproduced at* Joint Appendix 53, 62).

[16] The Union also cites a 1990 arbitral decision interpreting § 5(a) of *New York Dock*, which ruled that the test period average formula must be construed according to its literal terms. *International Bhd. of Elec. Workers v. CSX Transp., Inc.*, (Fletcher, Neutral Member) (Oct. 3, 1990) (*reprinted at* Union Br. Addend. 23c). As with the 1964 decision by Arbitrator Robertson, however, this decision is inapposite because it concerns the inclusion of non-protected wage earnings, rather than transaction-related overtime.

Notwithstanding this 1991 arbitral decision, which issued after CSX and the Union had agreed to incorporate the *New York Dock* conditions into their 1988 Implementing Agreement, the Commission's interpretation is consistent with the weight of arbitral precedent, lending further support to the reasonableness of its decision. Arbitration decisions reflect the industry's practice, usage and custom—factors properly considered in examining the context in which conditions' terms should be interpreted. In addition to their influence on the drafters of *New York Dock*, the arbitral interpretations have presumably affected the parties' understanding about the meaning of the conditions as they apply in practice. As such, they substantially mitigate any potential inequity associated with a regulatory construction at variance with the plain meaning of § 5(a). *Cf. Secretary of Labor v. Western Fuels–Utah, Inc.*, 900 F.2d 318, 326–27 (D.C. Cir. 1990) (Edwards, J., dissenting) (in regulatory interpretation, the plain meaning rule gives effect to basic principles of notice). This is particularly true in the instant case, where the Union was a party in two of the arbitration awards rejecting the Union's interpretation of § 5(a), both of which issued prior to the 1988 Implementing Agreement. *See ATDA v. Burlington N. R.R. Co.* (LaRocco, Neutral Member) (Jan. 9, 1987); *ATDA v. Baltimore & Ohio R.R. Co.*, Arb. Board No. 409 (Lieberman, Neutral Member) (May 6, 1982). At a minimum, these decisions put the Union on notice that § 5(a) of *New York Dock* might be interpreted to exclude transaction-related overtime; yet nothing in the record suggests, and the Union has not argued to the court, that the Union sought to clarify the scope of § 5(a) when it agreed to the Implementing Agreement, which incorporated *New York Dock*.[17]

[17] Partly for this reason, the Union's remaining argument based on "fundamental fairness" fares no better. It may be "fair" to permit employees to share in the economies created by a railroad consolidation, particularly where their mandatory overtime helps the transaction succeed. But the Union offered no evidence to suggest that either Congress, the Commission, or the drafters of the WJPA and their successors intended to go beyond the goal of

For these reasons, upon consideration of the design and purpose of the *New York Dock* conditions as a whole, as well as industry practice reflected in the arbitral awards, we are unpersuaded by the Union's reliance on the plain language of § 5(a). Because the Union has provided no other persuasive reason why the court should not defer to the Commission's interpretation of its own conditions, we deny the petition for review.

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protecting employees from being in a worse employment position as a result of a consolidation.

WALD, *Circuit Judge*, dissenting in part: Normally, we give great deference to an agency's interpretation of its own regulations. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). But deference is not due when the agency's interpretation flatly contradicts the only sensible reading of an unambiguous regulation. *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381, 2386 (1994) (agency's interpretation of its own regulation is not controlling if "plainly erroneous" or "inconsistent with the regulation"). Unlike the majority, I cannot find the term "total compensation" as used in Article I, § 5(a) of the *New York Dock* conditions at all ambiguous, and I would not defer to what seems to me a most extraordinary and implausible construction of the Commission's which cannot be justified in result any more than in rhetoric.[1]

Section 5(a) of the *New York Dock* conditions sets out a clear and straightforward fixed formula for calculating an employee's displacement allowance, based on her earnings in a twelve month "test period" immediately prior to displacement:

> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the *total compensation* received by the employee and the *total time* for which he was paid during the last *12 months* in which he performed services immediately preceding the date of his displacement as a result of the transaction

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[1] I agree with the majority that the *New York Dock* conditions are not a statute and therefore ordinary standards of statutory interpretation do not apply. *See* Majority opinion ("Maj. op.") at 10–11. Here, however, the Commission affirmed the arbitrator's award on the basis of an interpretation of its own regulation that, in my view, is "plainly erroneous" and squarely "inconsistent with the regulation" itself, and therefore not entitled to our deference. *See Thomas Jefferson University*, 114 S. Ct. at 2386; *United States v. Larionoff*, 431 U.S. 864, 872–72 (1977); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See also Gardebring v. Jenkins*, 485 U.S. 415, 430 (1987) (agency's interpretation of its own regulation is entitled to deference "unless ... [an] alternative reading is compelled by the regulation's plain language").

> (thereby producing average monthly compensation and average monthly time paid for in the test period)....

New York Dock, Art. I, § 5(a), 360 I.C.C. 60, 86 (1979) (emphasis added), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

The formula works like this: Begin with the date of the employee's displacement, and use the preceding twelve months as the "test period." To determine "average monthly compensation," take the employee's *total* compensation received during the 12-month test period, and divide by 12. Similarly, to determine "average monthly time paid for," take the *total* time for which the employee was paid during the 12-month test period, and divide by 12. It is hard to find anything ambiguous there; ordinary terms like "total compensation," "total time," and "12 months," coupled with elementary arithmetic, produce a predictable amount in all cases.

Like any fixed formula for calculating benefits based on time worked, this one may in some few cases produce arguably overly generous or not generous enough results. Although its *purpose* is to establish a benchmark of "normal" earnings, so as to determine how much an employee has lost from the displacement, the formula makes no adjustment for unusual factors which might make the specified 12-month test period unrepresentative for a given employee. So, for example, an employee who had previously worked twenty years without missing a day, but who is forced to take an unpaid leave during the test period due to illness or family circumstances, will end up with lower "total compensation," lower "average monthly compensation," and ultimately lower displacement benefits than one might expect based on her historical "normal" earnings. No adjustment is made for that unfortunate happenstance, even though it might be said that the employer is getting an unjust "windfall" and the employee is suffering an unjust loss.

Similarly, an employee who works an unusually large (or unusually small) amount of overtime during the 12-month test period will end up with "total compensation," "average

monthly compensation," and displacement benefits at variance with his historical "normal" earnings. In such cases the "windfall" can shift in either direction depending upon whether earnings are abnormally high or abnormally low in the test period. Though this kind of formula may sometimes produce aberrant results in individual cases, it is nevertheless widely used for its compensating virtues of objectivity, uniformity, certainty, and easy administrability.

Despite the lucidity of the formula and its acknowledged potential in some cases for producing atypical results, in either the employer's or employee's direction, it is argued that we should engage in its extensive reconstruction when a "literal" application would work against the employer's interests. In such cases, the Commission and the majority say, "total compensation" should be construed not to mean *total* compensation as that term is ordinarily understood (*i.e., all* the compensation an employee receives in the specified period), but instead something akin to "all the compensation the employee receives in the test period, except compensation for any hours in excess of the employee's 'normal' hours." "Normal" hours are not to be determined solely by reference to the 12–month "test period" specified in the § 5(a) formula; instead, a second, 8–month measuring period prior to the "transaction" is used as the norm. Any hours in the 12–month "test period" in excess of the employee's "normal" hours as determined from this 8–month measuring period, nowhere mentioned in § 5(a), are presumed to be "transaction-related," and are deducted from the employee's "average monthly hours worked." That second figure, multiplied by the employee's base rate of pay during the 12–month test period, becomes the new "average monthly compensation," and the basis upon which the employee's displacement benefits are calculated. *See American Train Dispatchers Ass'n v. CSX Transportation, Inc.*, 9 I.C.C.2d 1127, 1129 & n.6 (1993) (describing methodology).

Whatever other merits or demerits this methodology may have, it certainly does not derive from anything in the language of § 5(a). Indeed, I am hard pressed to see how this new construction can conceivably qualify as a plausible read-

ing of that provision. This is not a case where the term "total compensation" in § 5(a) can bear two plausible meanings, and the Commission has adopted the less obvious one. Rather, the objective formula for calculating displacement benefits so plainly prescribed by § 5(a) is 90% discarded, and an almost totally new methodology substituted in its stead. Under such extreme circumstances, I do not think the Commission's approach can be fairly said to "interpret," much less to "draw its essence from" § 5(a) or the *New York Dock* conditions generally, *Chicago & North W. Transp. Co.—Abandonment*, 3 I.C.C.2d 729, 735 (1987) (*"Lace Curtain"*), *aff'd sub nom. International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

The majority insists, however, that § 5(a) is ambiguous in light of the "design of *New York Dock* as a whole." Maj. op. at 13. In particular, the majority relies on the "narrow definition" of "displaced employee" in § 1(b) as "an employee ... who, as a result of the transaction is placed in a worse position with respect to his compensation and rules governing his working conditions," *New York Dock*, Art. I, § 1(b), 360 I.C.C. at 84. The majority says this "reflects an intention underlying the conditions to ensure that employees are no worse off (at least during the protected period) after a consolidation than they would be *had the consolidation never taken place.*" Maj. op. at 14 (emphasis in original).

This "narrow definition" of a displaced employee, however, is designed only to identify the class of employees eligible for displacement benefits—those injured, *i.e.*, "placed in a worse position" or made "worse off" as a result of the employer's transaction over a six-year period. There is no question that the dispatchers whose jobs were lost or downgraded by CXT's consolidation were "placed in a worse position," and therefore qualify for benefits, however we interpret § 5(a). The § 5(a) formula itself is designed to measure the benefits to which these "displaced" employees are entitled—not to determine whether they are "displaced" and qualify for benefits at all. It is like mixing apples and oranges to use the definition of who is a "displaced employee" and can receive benefits to narrow the plain language of how to calculate the

benefits due to such a person. Although § 1(b) reflects a general purpose behind the *New York Dock* conditions—to assist "displaced employees" by providing them with displacement benefits—it says nothing about how *much* assistance these employees should receive [2]; that amount is plainly set out in the formula in § 5(a). I can, in short, find no inconsistency or even tension between § 1(b) and § 5(a), certainly nothing sufficient to render the plain language of § 5(a) ambiguous.

When a provision of law defines an injury and provides that members of the injured class are entitled to compensation, it may be intuitive to expect that the compensation should be commensurate with the injury. But when as here, for other reasons such as predictability, administrability, certainty, etc., a separate provision specifies in plain and unambiguous terms an across-the-board formula for calculating the benefits members of the injured class are to receive, the terms of the benefits provision, not our intuitions, should control.

Actually, the majority's interpretive argument proves too much. Certainly it is true, as the majority argues, that the *New York Dock* conditions were not intended to produce "windfalls" for employees—or, we may add, for employers either. But if the majority's reasoning is sufficient to justify overriding a "literal" application of § 5(a) in this case, I do not see any principled ground on which to deny an override of § 5(a) anytime a "windfall" comes the way of either the employer or the employee. And that, of course, would defeat the purpose of the § 5(a) formula entirely, leaving the Commission with discretion in every individual case to decide whether or not the prescribed 12-month test period is truly representative of the employee's "normal" earnings, or whether § 5(a) should be overridden by some other "fairer" methodology unique to the facts of that case. Such a result is surely contrary to the purposes of *New York Dock*, which

[2] Indeed, if § 1(b) did carry any implications relevant to the measure of benefits, I would read it as setting a *floor* rather than a ceiling on benefits; after all, its concern is that employees not be placed in a *worse* position during the protected period.

patently seeks to prescribe a uniform, objective formula for determining displacement benefits. For instance, under the majority's reasoning, these provisions were no more *intended* to give a "windfall" to an employee who has abnormally large overtime earnings during the test period for reasons *unrelated* to the transaction causing her displacement—for example, an unexpected spike in business during the test year, or an unusual and temporary shortage of co-workers—than to one who has *transaction-related* overtime. I can foretell no grounds on which to distinguish between transaction-related and unrelated overtime, since *any* overtime earnings above a historical average would give the employee a six-year "windfall" arguably inconsistent with the purposes of *New York Dock*. Indeed, one might think it more unjust—and farther from the purposes of the *New York Dock* conditions—to reward employees with "windfalls" for extraordinary overtime *unrelated* to the transaction, since such circumstances are presumably more difficult for the employer to foresee and control than transaction-related overtime in a 12–month test period immediately prior to the employee's displacement.[3]

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[3] The Commission relies on the rationale that it would be unjust to allow employees to reap a "windfall" from *transaction-related* overtime during the 12–month test period, but in actual operation the methodology used here makes no distinction between transaction-related and unrelated overtime. *Any* overtime in the 12–month test period in excess of the employee's "normal" earnings in an 8–month measuring period prior to the the transaction is deleted from that employee's "total compensation" for purposes of calculating displacement benefits. *See* 9 I.C.C.2d at 1129 n.6, 1135. Thus if during the 12–month test period employee A is forced to work overtime due to employee B's illness, employee A's "excess" overtime will not count toward her displacement benefits; but employee B's displacement benefits will be based on her abnormally low earnings. The employer is not required to establish any causal nexus between the transaction and the overtime. *See id.* at 1135. The Commission apparently would shift the burden to the employee to show that overtime in the test period is *not* transaction-related, but offers no explanation why the evidentiary burden should fall on the employee. *See id.* In addition, this approach invites an unraveling of the clear and objective methodology of the § 5(a) formula

It seems equally certain that the *New York Dock* conditions were not *intended* to disadvantage an employee who, through no fault of her own, has abnormally *low* earnings during the 12–month test period, thus giving her employer a "windfall" by reducing her displacement benefits. Indeed, an employee who loses expected earnings in the "test year" may be banking on making up the loss in subsequent years, and therefore may be doubly "worse off" when the inflexibility inherent in the § 5(a) formula cuts short her displacement benefits. This result, too, may be the unintended and arguably unjust consequence of a "literal" application of the *New York Dock* formula. It is just as arguably inconsistent with the "context and purpose" of the regulatory scheme which aims to protect an employee's "normal" earnings as the majority thinks the present case. But no one suggests a reconstruction of the § 5(a) formula in these cases.

In sum, I find § 5(a) totally unambiguous, but acknowledge it is not without warts. Indeed, some might go so far as to conclude the drafters of the *New York Dock* conditions may have handed the current Commission a bad formula for calculating displacement benefits. Perhaps a different test period than the one plainly specified in § 5(a) would more fairly measure employees' "normal" earnings.[4] Perhaps it

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into a detailed, hour-by-hour, fact-based dispute over whether the overtime is, or is not, caused by or "related to" the transaction. I would conclude that the Commission's rationale, based solely on excluding *transaction-related* overtime, does not adequately explain the methodology actually used in this case. That alone is reason enough to reverse the Commission's action as arbitrary and capricious.

[4] Underlying the Commission's approach is the idea that the 12–month test period specified in § 5(a) is defective, giving a false indication of an employee's "normal" earnings in many cases. The test period consists of the 12 months prior to the date the employer's transaction first adversely affects the individual *employee*, a period which may embrace temporary fluctuations in earnings due to transitional arrangements necessitated by the transaction itself. To remedy this perceived flaw, the Commission allowed the employer to use a second test period entirely preceding the transaction,

would be better to use a formula that explicitly excludes transaction-related overtime from the calculation of displacement benefits. Or perhaps a fixed 12-month test period is too short and too arbitrary in any event, and more flexible individualized methods of calculating "normal" earnings can be devised. The Commission presumably may take appropriate measures to amend or replace the offending provisions. But those measures should not include reading the current provision to say what it plainly does not say.[5]

I would conclude that Article I, § 5(a) of the *New York Dock* conditions is not ambiguous, hold that the Commission's order affirming the arbitrator's award was arbitrary and capricious, and remand to the Commission for further proceedings. Therefore, I respectfully dissent from that portion of the majority opinion affirming the award.

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overriding the methodology unambiguously prescribed by § 5(a). A more straightforward solution would be to amend § 5(a) to provide for a different test period.

[5] Nor am I persuaded by the history of previous arbitrators' awards interpreting § 5(a) to exclude transaction-related overtime. If § 5(a) were truly ambiguous, these prior interpretations would carry great weight. But it seems to me that previous arbitrators, like the Commission in this case, disapproved on policy grounds the results unambiguously mandated by § 5(a). I decline to join them in entertaining the fiction that § 5(a) is ambiguous.

UNITED STATES COURT
OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

MANDATE
ISSUED
8-12-95
United States Court
of Appeals
For the District of
Columbia Circuit
Filed MAY 19 1995

No. 94-1036 **September Term, 1994**

American Train Dispatchers Association,
Petitioner,

v.

Interstate Commerce Commission
and United States of America,
Respondents

PETITION FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

BEFORE: Wald, Randolph and **Rogers,** Circuit Judges

J U D G M E N T

This cause came on to be heard on the petition for review of orders of the Interstate Commece Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED,** by the Court, that the petition for review is denied, in accordance with the opinion for the court filed herein this date.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: May 19, 1995

Opinion for the Court filed by Circuit Judge Rogers.
Opinion dissenting in part filed by Circuit Judge Wald.

UNITED STATES COURT
OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

United States Court
of Appeals
For the District of
Columbia Circuit
Filed JUL 21 1995

No. 94-1036 **September Term, 1994**

American Train Dispatchers Association,
Petitioner,

v.

United States of America,
Interstate Commerce Commission,
Respondents

BEFORE: Wald, Randolph and Rogers, Circuit Judges

O R D E R

Upon consideraton of petitioner's petition for rehearing filed July 3, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT
OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

United States Court
of Appeals
For the District of
Columbia Circuit
Filed JUL 21 1995

No. 94-1036 **September Term, 1994**

American Train Dispatchers Association,
Petitioner,

v.

United States of America,
Interstate Commerce Commission,
Respondents

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court, *in banc,* that the suggestion is denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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OCTOBER 9 1995

Mr. Gordon P. MacDougall
1025 Connecticut Ave., N.W.
Washington, DC 20036

Re: American Train Dispatchers Association
v. Interstate Commerce Commission, et al.
Application No. A-318

Dear Mr. MacDougall:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on October 9, 1995, extended the time to and including November 18, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/ Melissa A. Blalock

Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Mr. Gordon P. MacDougall
1025 Connecticut Ave., N.W.
Washington, DC 20036

Mr. Drew S. Days III
Solicitor General
U.S. Department of Justice
Washington, DC 20530

Mr. Henri F. Rush
Interstate Commerce Commission
Washington, DC 20423

Mr. James S. Whitehead
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One First National Plaza
Chicago, IL 60603

Mark J. Langer
United States Court of Appeals for
the District of Columbia Circuit
3rd & Constitution Avenue, NW
Washington, DC 20001

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 28, 1991 Decided November 22, 1991

No. 91-1032

AMERICAN TRAIN DISPATCHERS ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CSX TRANSPORTATION, INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

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Gordon P. MacDougall for petitioner.

Virginia Strasser, Attorney, ICC, with whom *James F. Rill,* Assistant Attorney General, *John J. Powers, III,* and *Robert J. Wiggers,* Attorneys, Department of Justice, and *Robert S. Burk,* General Counsel, and *Henri F. Rush,* Deputy General Counsel, ICC, were on the brief, for respondents. *Dennis J. Starks,* Attorney, ICC, also entered an appearance for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James D. Tomola and *James S. Whitehead* were on the brief for intervenor.

Before SILBERMAN, D. H. GINSBURG, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

D. H. GINSBURG, *Circuit Judge*: A union, the American Train Dispatchers Association, petitions for review of an Interstate Commerce Commission order dismissing its complaint against a carrier, CSX Transportation, Inc., and in effect remitting it to arbitration of its dispute. Because the order of the ICC is not a final order, we lack jurisdiction to review it at this time.

I. BACKGROUND

In 1987 CSX announced plans to consolidate its train dispatching operations into a single location. Pursuant to standards established by both the Congress, *see* 49 U.S.C. § 11347, and the ICC, *see New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), the carrier was required to determine the average monthly compensation level for its dispatchers. The average compensation level would then be used to calculate a displacement allowance for any CSX dispatcher who was adversely affected by the consolidation.

After CSX determined the average compensation level, the Union informed CSX that the carrier had improperly omitted from its calculation certain overtime earnings of the dispatchers. CSX refused to include the overtime, arguing that under *New York Dock* it was not required to include in the average compensation calculation "extraordinary" overtime earnings, *i.e.*, overtime earnings attributable to the consolidation itself.

The Union filed a complaint with the ICC, seeking an order compelling the carrier to include the disputed overtime earnings in the average compensation figure. The ICC dismissed the complaint, noting that article I, § 11 of

New York Dock provides for arbitration of such disputes. The Union has petitioned for review of the ICC's order.

II. Analysis

At the threshold, the ICC argues that the Union's petition is barred for want of finality, ripeness, and exhaustion of administrative remedies. Of these three requirements for review, only finality is jurisdictional, and so we are bound to consider it first. *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 746 (D.C. Cir. 1987) (separate opinion of Williams, J.); *see also Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("Jurisdiction is, of necessity, the first issue for an Article III court.").

Ordinarily, we have jurisdiction to review only a "final order" of the ICC. 28 U.S.C. § 2344. An agency order is final when it "impose[s] an obligation, den[ies] a right or fix[e]s some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948). In this case, however, the Union's challenge is purely procedural: it claims a right to be heard before the ICC in the first instance and objects to being shunted off to arbitration, subject to only limited ICC review of the arbitrator's decision. Wherever the outer boundary of the finality doctrine may lie, it is clear that a procedural ruling — an agency order that a party proceed "in one fashion rather than another" — is not a final order. *Aluminum Co. of America v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986) (*Alcoa*) ("[I]f the denial of a procedural right constitutes final agency action, then the doctrine of finality is indeed an empty box.").

A court can review a nonfinal agency order only in "extraordinary circumstances," *see id.*, such as when it causes a party severe and irreparable harm, *see FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (*Socal*); *Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 311-12 (D.C. Cir. 1981), or is "in clear violation of the law," *Alcoa*, 790 F.2d at 942. No exception to

the final order requirement applies here. That a party must endure the burden and expense of a certain procedure is not, without more, a sufficiently severe and irreparable harm to justify departure from the final order requirement. *See Socal,* 449 U.S. at 244. Nor has the Union shown that the ICC's decision to defer consideration of its claim until after arbitration is a "clear violation of the law."

III. Conclusion

We conclude that the Union seeks judicial review of a nonfinal order of the ICC, which we have no jurisdiction to grant. After an arbitrator decides this dispute in the first instance, the Union may seek ICC review of the arbitrator's decision. *See IBEW v. ICC,* 862 F.2d 330 (D.C. Cir. 1988). If the Union petitions for judicial review of any final order that the agency may then issue, it may be heard at that time on the merits of its claim that the ICC improperly remitted it to arbitration. *See Socal,* 449 U.S. at 245.

For the foregoing reason, the petition for review is

Dismissed.

APPENDIX B

SERVICE DATE
JUN 25, 1990

INTERSTATE COMMERCE COMMISSION
DECISION
Finance Docket No. 28905 (Sub-No. 24)

AMERICAN TRAIN DISPATCHERS ASSOCIATION
v.
CSX TRANSPORTATION, INC.
Decided: June 20, 1990

On November 1, 1989, American Train Dispatchers Association (ATDA) filed this complaint alleging that CSX Transportation, Inc. (CSX), did not properly compute displacement allowances under the employee protection conditions in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). CSX answered the complaint on January 11, 1990[1] and simultaneously moved to have it dismissed for lack of original Commission jurisdiction. We will grant the motion to dismiss.

BACKGROUND

On September 1, 1987, CSX notified affected train dispatchers, under Article I, section 4(a) of the *New York Dock* conditions,[2] that it would transfer and coordinate various train dispatching offices into a single, centralized train dispatching office in Jacksonville, FL. The transfer and coordination was to commence on, or after, May 2, 1988. An implementing

[1]The complaint was served on CSX on November 20, 1989, but it requested and was granted a 30-day extension to file an answer.

[2]The *New York Dock* conditions were imposed in *CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980); Finance Docket No. 30053, *Seaboard C. L. R. Co. — Merger Exemp. — Louisville & N.R. Co.* (47 F.R. 50772) published November 9, 1982; Finance Docket No. 31033, *Baltimore & O. R. Co. and C. & O. Ry. Co. — Merger Exemp.* (52 F.R. 19412) published May 22, 1987; and Finance Docket No. 31106, *The Chesapeake & O. Ry. and CSX Transp., Inc. — Merger Exemp.* (52 F.R. 35334) published September 18, 1987.

agreement to govern the transaction was entered into on January 9, 1988.

CSX prepared average monthly compensation statements for approximately 250 affected train dispatchers to be used to compute each employee's displacement allowance under Article I, section 5(a) of *New York Dock*. ATDA claims that these statements only included "straight" time earnings for the period after January 9, 1988, the date of the implementing agreement. Allegedly all "overtime" earnings for work done after that period were excluded in violation of 49 U.S.C. 11347, Article I, section 5(a) of *New York Dock*, and the Commission's *New York Dock* implementing decisions and notices. *See*, n. 2, *supra*. It seeks a finding that the average monthly compensation for displacement allowances must include all overtime earnings.

In its answer, CSX claims that *New York Dock* does not require that extraordinary overtime earnings attributable to the transaction itself be included in calculating an employee's average monthly displacement allowance. In support of its motion to dismiss, it argues that under Article I, section 11 of *New York Dock*, the dispute must be submitted to arbitration. Assertedly, the matter can only be brought to the Commission after ATDA has exhausted mandatory arbitration remedies.

ATDA replies that CSX cites only one arbitration case dealing with the issue and that, in any event, the Commission has an independent duty to administer its *New York Dock* conditions.

DISCUSSION AND CONCLUSIONS

CSX argues that the Commission lacks original jurisdiction to resolve disputes arising out of labor protective conditions

if the dispute is arbitrable under those conditions, and complainants have failed to exhaust their arbitration remedy.

We disagree that this dispute *must* be submitted to arbitration. In *Leavens v. Burlington Northern*, 348 I.C.C. 962 (1977) (*Leavens*),[3] the Commission found that its jurisdiction extends to all labor matters arising from the labor protective conditions it imposes in rail mergers. It held that arbitration procedures were adopted to ensure that "those most familiar with the complexities of labor law and particular problems associated with railroad employees would determine disputes arising out of such conditions." *Id.* at 975. Accordingly, it established guidelines to govern when it would exercise its jurisdiction to hear and resolve these disputes. Specifically, it limited its jurisdiction to these matters:

> (1) relating to affected employees' compensation guarantees, or matters *intimately* related thereto; and (2) (a) which occur as a result of the transaction from which the conditions arose, or (b) are in violation of a specific condition that was adopted to provide protection against specific merger-related harm. (*Id.* at 978.)

The Commission stated that it would limit its review only to determining whether there has been a failure to implement the protections required for adversely affected employees. *Id.* at 975. *Accord Chicago & North Western Transportation Co. — Abandonment*, 3 I.C.C.2d 729 (1987), *aff'd sub nom. Int. Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*Lace Curtain*).

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[3] *Leavens* involved the so-called *Northern Lines* conditions, in which the Commission approved and adopted as its labor protective conditions the collective bargaining agreements negotiated by the carriers and unions. *See Great Northern Pac. — Merger — Great Northern*, 331 I.C.C. 228 (1967) *aff'd* 269 F. Supp. 853, *aff'd sub nom. United States v. ICC*, 396 U.S. 491 (1970) (*Northern Lines*).

Although we have jurisdiction we are not compelled to exercise it here in the manner complainant seeks. We have been reluctant to intrude into the field of claims resolution, an area that has been traditionally deferred to arbitrators and others in rail labor-management who have expertise in labor matters. For this reason, we adopted arbitration as the vehicle of resolving individual disputes. *Leavens, supra* at 979 and *Lace Curtain, supra* at 735.

In the past, the Commission and the courts have deferred to arbitration disputes involving: (1) whether, for benefit coverage purposes, an employee is part of labor or management;[4] (2) whether an employee dismissed for cause is entitled to labor protection;[5] and (3) whether an employee was adversely affected by a transaction.[6] As pertinent here, disputes over the calculation of benefits have been deferred to arbitration.[7] By contrast, the Commission itself has considered, as a general matter, whether the compensation received by employees satisfy statutory minimum levels[8] and decided complaints on employee eligibility for labor protec-

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[4]*Haskell H. Bell v. Western Maryland Railway Company*, 366 I.C.C. 64, 67 (1982); and Finance Docket No. 30853, *L. A. Rowlett, Jr. v. Missouri Pac. R. Co.* (not printed), served August 19, 1987.

[5]Finance Docket No. 21478 (Sub-No. 7), *Great Northern Pac. — Merger — Great Northern (John Arco)* (not printed), served March 26, 1987.

[6]*Walsh v. ICC*, 723 F.2d 570 (7th Cir. 1983); *Atkinson v. Union Pacific R. Co.*, 628 F. Supp. 1117 (D.Kan. 1985); *Bond v. Union Pacific Railroad Co.*, 601 F. Supp. 329 (D.Neb. 1984); *McKeon v. Toledo, Peoria and Western R. Co.*, 595 F. Supp. 766 (C.D.Ill. 1984); and *Brotherhood of Locomotive Engineers v. C&NW Transp. Co.*, 366 I.C.C. 857, 861 (1983).

[7]*See* Finance Docket No. 25103, *Illinois Cent. G.R. Co. — Acq. Gulf, M. & O. R. Co., Illinois Cent. R. Co.* (not printed), served April 3, 1989; and Finance Docket No. 21478 (Sub-No. 10), *supra* .

[8]*See Norfolk and Western Railway Company v. Nemitz*, 404 U.S. 37 (1971).

tion.[9] Also, on court remand, the Commission has determined the method of computing compensation guarantees for non-union employees.[10]

We agree with CSX that this dispute should be submitted to arbitration under Article I, section 11 of *New York Dock*. Consistent with *Lace Curtain*, the arbitrator can address this question in the first instance. The appellate remedy before us ensures consistency with *New York Dock*.

CSX cites four arbitration decisions that ruled on the calculation of displacement allowances. One involved claims under *New York Dock*,[11] two involved claims under agreements implementing coordinations under the Washington Job Protection Agreement (WJPA),[12] and the last involved a coordination agreement implementing a 1947 merger.[13] In response,

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[9]*See, e.g.*, Finance Docket No. 21478 (Sub-No. 3), *Pogatshnik v. Burlington Northern, Inc.*, (not printed), served March 2, 1977, *aff'd sub nom. American Train Dispatchers Ass'n v. ICC*, 578 F.2d 412 (D.C. Cir. 1978); Finance Docket No. 21478 (Sub-No. 11), *Great Northern Pac. — Merger — Great Northern (Matter of James G. Moser and John T. Navin)* (not printed), served July 28, 1989 and November 7, 1989; and *Brotherhood of Ry. A&SC. et al. v. Southern Frt. T. Bur.*, 366 I.C.C. 390 (1982).

[10]*See* Finance Docket No. 21478 (Sub-No. 6), *Great Northern Pac. — Merger — Great Northern (Landis)* (not printed), served December 11, 1986 and April 5, 1988; Finance Docket No. 21478 (Sub-No. 8), *Great Northern Pac. — Merger — Great Northern (Dean, et al.)* (not printed), served April 5, 1988; Finance Docket No. 21478 (Sub-No. 9), *Great Northern Pac. — Merger — Great Northern (Barr, et al.,)* (not printed), served April 5, 1988; and Finance Docket No. 21478 (Sub-No 10), *Johnson v. Burlington Nor. R. Co.* (not printed), served May 13, 1989. These cases involved computation under the *Northern Lines* conditions.

[11]*Trans-Com. Union — and — Missouri Pac. R. Co. and Union Pac. R. Co.*, Award No. 5 (LaRocco March 1, 1988)

[12]*American Train Disp. Assn. and Baltimore & O. R. Co.*, Arbitration Board No. 409 (Lieberman, May 6, 1982) and; *Tran-Com. Union — and — The Georgia R.*, Docket No. 137 (Bernstein).

[13]*Bro. of Ry. & St. Clerks and Chesapeake & O. Ry. Co.*, Docket No. 62.

ATDA emphasizes that only one of the cases CSX cites concerned a *New York Dock* arbitration, and asserts that it has not been clearly accepted.

While only one case specifically concerned *New York Dock* each ruled on the precise question at issue here, whether excessive overtime earnings attibutable to the respective transaction can be included in "test period earnings" for calculating displacement allowances. These arbitration awards demonstrate that arbitrators have the necessary knowledge and experience of industry practice, and are capable of applying both to resolve similar types of disputes whether they arise under *New York Dock* or elsewhere.

ATDA also argues that, because a large number of individual complaints are involved, we should follow *Landis, supra.* There, the Commission determined it would resolve disputes where a definitive interpretation will clarify the law and affect many other similarly situated employees. We do not find *Landis* sufficiently comparable or dispositive.

Landis originated as a lawsuit filed in Federal District Court by affected employees. They had alleged that Burlington Northern Railroad Company (BN) breached the "general wage increase" provisions of the *Northern Lines* merger protections. Responding to BN's request, the court referred the case to the Commission. The Commission recognized that the dispute was arbitrable but decided to resolve it because numerous other similarly situated employees were affected. The Commission made it clear that its action was limited to computing compensation guarantees for the approximately 1,000 management employees covered by the *Northern Lines* merger conditions.

ATDA has made no showing here that there is a large class of similarly situated employees who would benefit from a Commission decision transcending the specific issues raised by

these claims, or that a ruling by us at this juncture is necessary to clarify the law.

We view the dispute here as one limited to the calculation of individual benefits, for a defined and limited group, under the *New York Dock* conditions. This is essentially a factual matter, within an arbitrator's special dispute resolution role under Commisison-imposed labor protection. We will grant the motion to dismiss. Appeals of any arbitration decision will be governed by the procedures and standards set forth in *Lace Curtain*.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT's motion to dismiss ATDA's complaint is granted.

2. This decision is effective on June 25, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett.

(SEAL)

Noreta R. McGee
Secretary

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE
NOV 19 1990

Finance Docket No. 28905 (Sub-No. 24)

AMERICAN TRAIN DISPATCHERS ASSOCIATION

v.

CSX TRANSPORTATION, INC.

Decided: November 9, 1990

On November 1, 1989, American Train Dispatchers Association (ATDA) filed a complaint alleging that CSX Transportation, Inc. (CSXT), improperly excluded overtime earnings from the calculation of average monthly compensation under the employee protective conditions in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).[1] In a decision served June 25, 1990 we found the dispute essentially a factual matter concerning the calculation of individual benefits (displacement allowances) under the *New York Dock* conditions. As such, we found it properly within an arbitrator's special dispute resolution role under Commission-imposed labor protective conditions and granted CSXT's motion to dismiss. ATDA has appealed our decision, and CSXT replied. We are denying ATDA's petition to reopen and reconsider.

DISCUSSION AND CONCLUSIONS

ATDA contends that our decision erred because its complaint addressed average monthly compensation, not displacement allowances. In response to CSXT's contention on reply, that average monthly compensation has no significance except

[1]The *New York Dock* conditions were imposed in *CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980); Finance Docket No. 30053, *Seaboard C. L. R. Co. — Merger Exemp. — Louisville & N. R. Co.* (47 F.R. 50772) published November 9, 1982; Finance Docket No. 31033, *Baltimore & O. R. Co. and C.& O. Ry. Co. — Merger Exemp.* (52 F.R. 19412) published May 22, 1987; and Finance Docket No. 31106, *Chesapeake & O. Ry. and CSX Transp., Inc.— Merger Exemp.* (52 F.R. 35334) published September 18, 1987.

for determining displacement allowances, ATDA contends[2] that employees use the average monthly compensation figure in deciding whether to bid on positions in making benefit election decisions if *New York Dock* alternatives are offered.[3] Notwithstanding that the average monthly compensation figure may be of use to employees, the complaint unequivocally sought, at 4, a declaration that average monthly compensation under the section of *New York Dock* exclusively devoted to displacement allowances[4] includes total compensation received.

Nor is it clear why we should have an initial role in the caclulation of average monthly compensation for purposes other than displacement allowances. Indeed, regardless of the collateral uses to which it may be put, the compensation calculation is to determine displacement allowances and is a factual matter. To the extent it is used informally in calculating *New York Dock* benefits, disputes relating to it are appropriate for arbitration.

ATDA next contends that we have previously granted the relief it seeks to nonunion or management employees. As noted in our June 10 decision at 4, we determined the method of computing compensation guarantees for nonunion employees in Finance Docket No. 21478 (Sub-No. 6), *Great Northern Pac.*

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[2]Although a reply to a reply is prohibited under 49 CFR 1104.13(c), we have exercised our discretion to consider it under 49 CFR 1100.3.

[3]The average monthly compensation calculated under Article I, Section 5 of *New York Dock* is used for election of benefits under Article I, Section 3. Bidding on new positions is not a *New York Dock* matter. Moreover, we see no relationship between the bidding decision and CSXT's determination of what elements of past compensation should be perpetuated as displacement allowances.

[4]Article 1, Section 5(a). The complaint (at page 4) prays that "* * * an order be made declaring that average monthly compensation for the purposes of Article I, Section 5(a) of *New York Dock* includes total compensation received by an employee during the applicable 12-month period; * * * ".

— *Merger — Great Northern* (Landis) (not printed), served December 11, 1986, and April 5, 1988. *Landis*, however, preceded our current and judicially approved policy of referring cases to arbitration before Commission review. *See UTU v. ICC*, 905 F.2d 463, 470 (D.C. Cir. 1990). Arbitration subject to our review had not evolved. Sending the issue to arbitration therefore was not considered.[5] Moreover, unlike the instant proceeding, *Landis* was before us on court remand and referral to an arbitrator would not have been appropriate. The union or nonunion status of the affected employees was not a factor in the disposition of these otherwise dissimilar proceedings. We do not apply different standards to similarly situated union and nonunion employees.

ATDA also advances three arguments to support a Commission resolution in the first instance. As in *Landis*, it submits that the issues involved here will affect a large class of similarly situated employees, namely, the 250 train dispatchers it allegedly represents here. CSXT asserts that only 142 dispatchers were affected but notes that ATDA has brought this complaint on behalf of all dispatchers affected by the overtime exclusion. The record shows no large class of similarly situated employees not encompassed within the present dispute. Rather, the record demonstrates that the dispute is, as we said earlier, "limited to the calculation of individual benefits for a defined and limited group."

Next ATDA contends that there are no pending "claims" for displacement allowances, a matter disputed by CSXT. Regardless of the accuracy of this contention, ATDA is entitled to file timely claims and proceed under *New York Dock* if its members are aggrieved by CSXT's determination. ATDA

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[5] *Chicago & North Western Tptn. Co. — Abandonment*, 3 I.C.C. 2d 729 (1987), *aff'd sub nom. Intl. Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*Lace Curtain*).

has not justified a departure from the standard claim arbitration procedure provided by *New York Dock*.

Finally, ATDA submits that we should resolve "the apparent confusion between *New York Dock* and other agreements ***." We are aware of no confusion in this regard. Our prior decision noted that four arbitration decisions had addressed the calculation of displacement allowances where there were excessive overtime earnings. Although only one arose under *New York Dock*, we found that the decisions all involved the same issue and that taken together they amply demonstrate that the instant issue is within the arbitrators' ability to resolve. To further support our original finding on this issue CSXT notes that two of the other four arbitration decisions were under the Washington Job Protection Agreement, the predecessor and model for the *New York Dock* conditions. Finally, we note that whenever an arbitral resolution deviates from *New York Dock*, review is available here subject to the standards and procedures adopted in *Lace Curtain*.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ATDA's petition to reopen and reconsider is denied.

2. This decision is effective on November 19, 1990.

By the Commmission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Emmett, and McDonald.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

FINANCE DOCKET NO. 28905 (SUB-NO. 24)
AMERICAN TRAIN DISPATCHERS ASSOCIATION
v.
CSX TRANSPORTATION, INC.
(ARBITRATION REVIEW)

SERVICE DATE
NOV 17 1993

Decided November 2, 1993

The Commission affirms an arbitrator's finding that transaction-related overtime is appropriately excluded from the computation of an employee's average monthly compensation to determine a *New York Dock* displacement allowance.

BY THE COMMISSION:

By complaint filed November 1, 1989, American Train Dispatchers Association (ATDA) asked the Commission to find that CSX Transportation, Inc. (CSXT), had improperly excluded certain overtime earnings from the calculation of average monthly compensation of certain displaced employees. As a result, complainant alleged, the displacement allowance under *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979) (*New York Dock*),[1] would be unfairly reduced. CSXT moved

[1]Article I, § 5(a) of *New York Dock*, 360 I.C.C. at 86, provides for:

> a monthly displacement allowance equal to the difference between the monthly compensation received by [the displaced employee] in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
>
> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the past 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period) ***.

to dismiss on the ground that arbitration is the exclusive remedy of such a dispute.

In an unprinted decision served June 25, 1990, the Commission declined to exercise its jurisdiction over the dispute because it found that the dispute was limited to individual *New York Dock* benefit calculations (displacement allowances) for a defined and limited group. The dispute was thus viewed as an essentially factual matter which falls within the special dispute resolution role of an arbitrator. Thus, CSXT's motion to dismiss was granted.[2] An administrative appeal was denied in an unprinted decision served November 19, 1990, and the United States Court of Appeals subsequently dismissed as premature ATDA's petition for review of these decisions in *American Train Dispatchers Ass'n v. ICC*, 949 F.2d 413 (D.C. Cir. 1991).

Pursuant to these decisions and article I, § 11 of *New York Dock*, an arbitral committee was convened (Hugh G. Duffy, neutral), and a hearing was held on June 19, 1992. On August 31, 1992, the committee, with the organization member dissenting, upheld the position of CSXT. ADTA has appealed the award.[3] We are denying the appeal.

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[2] The Commission noted at that time the availability of the appellate remedy now invoked.

[3] ATDA's timely petition apparently mooted its prior request for an extension of time to file. *See* unprinted decision served September 28, 1992. ATDA noted, however, that its petition would require supplementation and subsequently tendered a brief accompanied by a request for leave to file. CSXT did not oppose the request and addressed the brief in its reply. Accordingly, the brief is accepted. The brief and petition collectively exceed the page limitation in 49 C.F.R. § 1115.2(d). We will waive the page limitations in the interest of a complete record.

BACKGROUND

Following Commission approval, subject to *New York Dock* protections, of a group of mergers,[4] CSXT announced its intention to consolidate train dispatching functions from numerous locations on its system to a single facility in Jacksonville FL. The carrier and ATDA reached an implementing agreement on January 9, 1988. On February 1, 1988, CSXT began extensive training of future transferees in the advanced computer technology to be used at Jacksonville. Actual transfers began in May 1988 and extended well into 1989 as existing locations were sequentially coordinated into the Jacksonville facility.

Because of open bidding on Jacksonville positions, many dispatchers transferred before their former duty station was closed, leaving vacancies. In addition, these dispatchers required familiarization training for their new territory of responsibility as well as in the new technology.[5] The combination of training and manpower shortages in the remaining field locations resulted in substantial mandatory overtime for many dispatchers in the 12-month period before their displacement through reassignment.

In February 1989, CSXT computed the average monthly compensation (the test period average) for those dispatchers

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[4]*See CSX Corp. — Control — Chessie and Seaboard, C.L.I.*, 363 I.C.C. 521 (1980) (the principal consolidation) and three related exemptions: Finance Docket No. 30053, *Seaboard C. L. R. Co. — Merger Exemp. — Louisville & N. R. Co.*, 47 Fed. Reg. 50,772 (1982); Finance Docket No. 31033 *Baltimore & O. R. Co. and C. & O. Ry. Co. — Merger Exemp.*, 52 Fed. Reg 19,412 (1987); and Finance Docket No. 31106 *The Chesapeake & O. Ry. and CSX Transp., Inc. — Merger Exemp.*, 52 Fed. Reg. 35,334 (1987).

[5]For example, a dispatcher at Columbus, OH, could bid on a Jacksonville position that would control operations at Corbin, KY, with which he may be unfamiliar. His transfer could be effective upon closure of the Corbin facility, notwithstanding that the Columbus facility was still operating.

already displaced by the first round of reorganization. Where CSXT determined that a dispatcher had worked extraordinary overtime hours as a result of the transaction, it deleted the extraordinary overtime hours and associated earnings from the employee's average monthly compensation.[6] Contending that CSXT's exclusion of extraordinary, transaction-related overtime from the average monthly compensation computation violates the "total compensation" standard of article I, § 5(a), ATDA filed its November 1, 1989, complaint and, ultimately, submitted claims to arbitration which resulted in the instant appeal.

DISCUSSION AND CONCLUSIONS

1. *Scope and standards.* ATDA renews its prior argument that this matter is within this Commission's exclusive and original jurisdiction and not subject to arbitration. It contends that we must, at this stage, decide the dispute *de novo* by vacating the arbitral decision and assigning the matter for hearing under the modified procedure. In the prior decisions, we have twice rejected the underlying jurisdictional argument. For the reasons previously articulated in those decisions, the motion for *de novo* hearing is denied.

ATDA contends alternatively that this case is appropriate for appellate review under our standards in 49 C.F.R. § 1115.8, because of the lack of a definitive Commission interpretation of the "total compensation" requirement of article I, § 5(a) and inconsistencies between arbitral decisions on the

[6]CSXT compared the average number of hours worked each month by an employee during the 12 months covered by his test period with the average number of hours worked each month during the 8-month period ending January 31, 1988. CSXT eliminated the excess hours from the monthly average of hours worked during the test period and also reduced the average monthly earning by the straight-time earnings associated with these excess overtime hours.

subject.[7] We agree. This is a potentially significant issue of general importance regarding the proper interpretation of article I, § 5(a) of the *New York Dock* conditions which has not been addressed previously by the Commission.

As to the standard of review, the Commission explained in Finance Docket No. 28490 (Sub-No. 1), *Atl. Rich. et al. — Cont. — Butte, Anaconda & Pac. Ry. et al.* (not printed), served March 2, 1988, *aff'd* 5 I.C.C.2d 934 (1988), that *Lace Curtain* adopted the deferential criteria set forth in the so-called *Steelworkers Trilogy*.[8] Awards are not vacated because of substantive mistake, except where there is egregious error, when the award fails to draw its essence from the labor protective conditions, or when the arbitrator exceeds the specific limits on his authority. *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982).[9] "Egregious error" means "irrational," "wholly baseless and completely without reason," or "actually and indisputably without foundation in reason and fact." *Id.* When reviewing an arbitrator's interpretation of the Commission's labor conditions, the agency is entitled to subject it to "more searching review." *Railway Labor Executives' Ass'n v. U.S.*, 987 F.2d 806, 812 (D.C. Cir.

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[7]The reviewable issues in an arbitral decision are set out in *Chicago & North Western Tptn. Co. — Abandonment*, 3 I.C.C.2d 729, 736 (1987), *aff'd sub nom. International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*Lace Curtain*). There the Commission stated that its review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." We do not review issues of causation, calculation of benefits, or resolution of other factual questions. *See also CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715, 752-53 n.31 (1990) (Carmen).

[8]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[9]The *Loveless* test involved a collective bargaining agreement from which the award must "draw its essence." In our context, the labor protective conditions which we impose are analogous to collective bargaining agreements.

1993). Moreover, "The Commission is entitled to considerable deference when it has interpreted the terms of its own decrees or regulations." 987 F.2d at 818. ATDA does not dispute the application of these standards to our review of the arbitral award.

2. *The arbitral award.* The arbitral committee resolved a specific claim involving dispatcher John P. Barr, to provide guidance for the numerous disputes involved here.[10] On June 18, 1988, dispatcher Barr was reduced to the basic craft of clerk (pending recall to a dispatcher position at Jacksonville) when his home facility closed. Before and after the closing, he was required to incur substantial overtime and travel allowances as a substitute for other dispatchers in training for or in transit to new postions at Jacksonville. In calculating dispatcher Barr's average monthly compensation for the 12-month test period immediately prior to his displacement, CSXT declined to use his "total compensation received" as specified in article I, § 5(a). Instead, CSXT deducted 9.67 hours per month, the difference between dispatcher Barr's average hours during the test period and his average hours during the 8 months immediately prior to the commencement of the training program.

The committee traced the *New York Dock* prescription for displacement allowances from the Washington Job Protection Agreement of 1936 (WJPA), the Congressional mandate for employee protection in the Transportation Act of 1940 (545 Stat. 906) (now 49 U.S.C. § 11347), the resulting predecessor provisions for employee protection, and other legislation, and found that the provision had remained essentially unchanged. Accordingly, arbitral decisions construing the WJPA, prior

[10]ATDA also asks that we review and recalculate the average monthly compensation for dispatchers Lenox Hacker and J.P. Allen as well as dispatcher Barr. As noted above, however, the caculation of individual benefits is not a reviewable issue.

Commission standards, and legislative requirements[11] were deemed relevant to this *New York Dock* dispute.

The committee found the "total compensation" requirement inherently ambiguous and left generally to arbitrators to interpret on a case-by-case basis. Early arbitral decisions submitted by ATDA[12] interpreted the language (as used in prior versions of the protective conditions) literally. Subsequently, however, the WJPA § 13 Disputes Committee held that: "In computing [average monthly compensation], it is proper to exclude overtime earnings in excess of average overtime directly attributable to increased pre-coordination work opportunities caused by the impending coordination."[13] This led to a line of arbitral authority that transaction-related overtime was to be excluded as abnormal and windfall earnings, the perpetuation of which over the numbers of years in the employee's protective period would be contrary to the earnings protection purpose of the WJPA.[14] The committee found aberrant

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[11]Standard conditions had been established in such cases as *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944) (*Oklahoma*); and *New Orleans Union Passenger Terminal Case*, 267 I.C.C. 763 (1948) (*New Orleans*, clarified in *Southern Ry. Co. — Control — Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), and 331 I.C.C. 151 (1967) (*Central of Georgia*). Subsequently, the Railroad Revitalization and the Regulatory Reform Act of 1976 (90 Stat. 62) required the inclusion of the so-called "Appendix C-1 conditions" derived from § 405(c) of the Rail Passenger Service Act of 1970 (45 U.S.C. 565). The *New York Dock* conditions were established in response to this mandate.

[12]*E.g., Brotherhood of Railway and Steamship Clerks v. Western Md. Ry.*, Arbitration Board No. 284 (Robertson, Arbitrator) (1964).

[13]*See Brotherhood of Railway Clerks v. Chesapeake & O. Ry.*, WJPA Docket No. 62 (Bernstein, Referee); and *Transportation-Communications Employees' Union v. Georgia R.R.*, WJPA Docket No.127 (Bernstein, Referee). WJPA dockets are apparently not kept in a centralized location or in a standard form. These decisions were furnished by CSXT.

[14]See American Train Dispatchers Ass'n v. Baltimore & O. R.R., Arb. Board No. 409 (Lieberman, Neutral-Chairman) (1982)-WJPA implementing agreement; *Transportation-Communications Int'l Union v. Missouri*

the single award that deviated from this view.[15]

The organization member dissented. He contended that the literal language in article I, § 5(a), required the committee to base its award on total compensation received and total time paid for during the last 12 months immediately preceding the date of an employee's displacement and that involuntary overtime did not constitute a windfall.

3. *Appeal and reply.* ATDA contends that the award was procedurally unfair because the committee did not consider the entire issue presented by ATDA, *i.e.*, the inclusion of overtime earning in the average monthly compensation of all displaced employees.[16] We believe the committee's representative use of the Barr claim was appropriate to dispose of the issue of whether transaction-related overtime could properly be excluded from the average monthly compensation of the group as a whole. Thus, ATDA's allegation that no actual claims for displacement allowances were being litigated is immaterial. The principle is the same and, in any event, is the sole issue which we are reviewing here. The committee determined that Barr had transaction-relation overtime, interpreted the law to permit exclusion of this overtime, and devised a method of eliminating it from the compensation calculation. Barr's claim was fully heard, and the claims of other displaced employees were not prejudiced. Any of them may present

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Pac. R.R. and Union Pac. R.R. (LaRocco, Neutral) (1987) — National Agreement; and *Transportation-Communications Int'l Union v. Burlington Northern R.R. Co.* (LaRocco, Neutral) (1990) — Appendix C-1 Conditions.

[15]*International Brotherhood of Electrical Workers v. Burlington N. R.R.* (Willits, Neutral Member) (1991). The Willits panel found it was bound by the literal language of the Appendix C-1 conditions.

[16]ATDA also contends in this context that the award did not draw its essence from the undertaking (i.e., from ATDA's formulation of the dispute). Our application of *Steelworkers' Trilogy* requires that the award draw its essence from the employee protective conditions.

evidence to show that their overtime was not transaction-related. We are unable to discern any procedural unfairness in this situation.

Substantively, ATDA submits that WJPA arbitral decisions are not binding on a *New York Dock* dispute because of substantial differences between *New York Dock* and the WJPA. Moreover, the cited history of labor protective conditions (*supra)* is assertedly flawed. Consequently, in its view, the Committee's finding is unprecedented.

The differences cited by ATDA are by its own acknowledgment illustrative, and none is directly on point.[17] The WJPA "generally is conceded to be the blueprint for all subsequent job protection arrangements." *New York Dock Ry. v. United States,* 609 F.2d 83, 86 (2d Cir. 1979). We have noted that the Transportation Act of 1940, the source of present § 11347, was, in effect, a Congressional endorsement of the WJPA. *See Carmen, supra,* 6 I.C.C.2d at 739. In any event, article I, § 5 of the *New York Dock* conditions was in turn taken without substantive change from the WJPA. Thus, we conclude that the WJPA arbitral awards do present persuasive precedent on which a *New York Dock* arbitration committee may rely.

ATDA next contends that the dispute is governed by the plain meaning of article I, § 5(a) and that the Willits award, dismissed by the Committee as aberrant, actually reflects the current judicial trend. The Willits committee, in an Appendix C-1[18] dispute, found (carrier member dissenting) no "cogent foundation for exception to the explicit, clear and unambiguous language contained in article I, § 5 (a)" in either the legislative

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[17]ATDA states that WJPA § 6(a) is not carried over in full to *New York Dock* § 5(a); WJPA section 1 is not in *New York Dock*; and *New York Dock* defines "displaced employee" and allows an election of benefits.

[18]The Appendix C-1 conditions are set out in *Oregon Short Line R. Co. — Abandonment — Goshen,* 354 I.C.C. 76, 89-96 (1977). Their evolution is further described, *Id.* at 80-85.

history of the National Railroad Passenger Service Act (RPSA), the Secretary of Labor's certification of the Appendix C-1 conditions, or the parties' Memorandum of Agreement incorporating the conditions. Award at 11. The committee concluded that it could not "ignore the plain language of the contract," citing *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (*Misco*).[19]

However, where the provision in dispute is ambiguous or contrary to other provisions, consideration of the underlying policies and purposes of a statute, rule or contract is proper. We agree with the Committee that the terms "total compensation" and "total time," if applied literally in the context of transaction-related overtime, would be contradicted by the overall policy of *New York Dock* and its predecessors that employees be protected only against those losses that are caused by the transaction. *See e.g., New York Dock* article I, § 1(b), "Displaced employee." An employee does not lose, "as a result of the transaction," that which he would never have had but for the transaction. Indeed, a "plain meaning" interpretation of total compensation and total time would "ignore the plain language of" *New York Dock. Misco, supra.*

Relying on *Brotherhood of Railway and Steamship Clerks v. Western Md. Ry.*, Arbitration Board No. 284 (Robertson, Arbitrator) (1964), and *International Bro. of Elec. Workers v. CSX Transp., Inc.* (Fletcher, Neutral Member), (1990), ATDA contends that a pragmatic, plain-meaning construction of the total compensation/time language was intended to avoid disputes, even though unavoidably arbitrary, working sometimes in the displaced employee's favor and sometimes against it. Both arbitrations, however, apparently involved the

[19]The Willits committee found alternatively that the carrier had not shown the overtime to be transaction-related.

inclusion of enhanced earnings not resulting from the transaction. They are inapposite to this dispute over transaction-related overtime.

ATDA contends that compulsory overtime, as here, does not lead to a windfall for claimant but results in a substantial benefit to the carrier who chooses, at the employees' expense, not to hire additional employees to perform the work without overtime. We disagree. The *New York Dock* conditions are designed to protect employees from harm caused by the transaction. The loss of transaction-related overtime, whether compulsory or voluntary, is not a protected harm, because it is not within an employee's normal earnings expectations. Where, as here, the transaction itself has caused the overtime, to carry the overtime forward into the average prior monthly compensation for a period of up to 6 years would have the unintended result of guaranteeing a higher wage level than if the transaction had not taken place. Complainant presents no convincing rationale to justify its demands. Nor does it show that the award's ruling on this issue contained an egregious error, failed to draw its essence from the *New York Dock* conditions, or was rendered by a committee that exceeded its authority.

Alternatively, ATDA objects to the method used to account for transaction-related overtime. It notes that the 8-month period used to calculate straight time was partly outside the 12-month test period prescribed by article I, § 5(a), and that CSXT merely assumed that the overime was transaction-related. CSXT, however, did not use the 8-month period to calculate compensation — only to compare the extent of overtime hours accrued prior to the transaction's implementation. Thus, it served as a control, disclosing whether the employee's overtime hours had been inflated during the test period as a result of overtime associated with the consolidation. Moreover,

in the specific claim in dispute here [Barr], the overtime is admittedly transaction-related. Other claimants are free to show otherwise.

In summary, ATDA has failed, under our criteria, to show that the arbitral award is in error. This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The arbitration award is affirmed.

2. This decision is effective on November 17, 1993.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin, and Walden.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

APPENDIX C

ARBITRATION COMMITTEE

In the Matter of Arbitration between

American Train Dispatchers Association

and

CSX Transportation, Inc.

OPINION AND AWARD
Pursuant to Art. I, Section 11,
New York Dock Conditions.

Arbitration Committee:

Hugh G. Duffy, Chairman and Neutral Member
George J. Nixon, Jr., Organization Member
Brenton C. Massie, Carrier Member

Appearances:

For the Organization:

Gordon P. MacDougall, Esq., Counsel
H.E. Mullinax, Vice President
Vernon Skeans, General Chairman

For the Carrier:

James D. Tomola, Esq., Senior Counsel

I. *APPOINTMENT OF ARBITRATION COMMITTEE*

On August 6, 1991, Hugh G. Duffy was nominated by the National Mediation Board to serve as Chairman and neutral member of a *New York Dock* Article I, Section 11 Arbitration

Committee to resolve a dispute involving the American Train Dispatchers Association (hereinafter "organization") and CSX Transportation, Inc. (hereinafter "Carrier"). Mr. Brenton C. Massie was designated as the representative of the Carrier, and Mr. H.E. Mullinax was designated as the representative of the Organization. On May 27, 1992, because of the temporary unavailability of Mr. Mullinax, Mr. George J. Nixon, Jr. was designated as the representative of the Organization.

The parties submitted Pre-Hearing Briefs, and a hearing was held on June 19, 1992 in Baltimore, Maryland, during which exhibits were offered and made part of the record and oral argument was heard. The parties submitted Post-hearing Briefs on July 27, 1992.

II. *STATEMENT OF THE CASE*

This case involves a dispute over the method for calculating displacement allowances under Article I, Section 5(a) of the *New York Dock* conditions.

The Carrier contends that the "average monthly compensation" computation under Section 5(a) must be adjusted to reflect any transaction-related overtime. The Organization contends that the literal terms of Section 5(a), i.e., "total compensation received", do not allow for such an exclusion.

The parties have agreed that this Arbitration Committee should resolve a specific dispute involving John P. Barr (hereinafter "Barr"), a displaced employee, in order to provide guidance to the parties in resolving a large number of similar disputes on the property.

III. *BACKGROUND OF THE DISPUTE*

Beginning 1980, the Interstate Commission (hereinafter "ICC") approved several railroad consolidation applications

filed by the carrier or its predecessor carriers (*CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980); *Seaboard C.L.R. Co. — Merger Exemp. — Louisville & N.R. Co.*, Finance Docket No. 30053, 47 F.R. 50772 (Nov. 9, 1982); *Baltimore & Ohio Ry. Co. and C & O Ry. Co. — Merger Exemp*, Finance Docket No. 31033, 52 F.R. 19412 (May 22, 1987); and*The Chesapeake & Ohio Ry. Co. and CSX Transportation, Inc. — Merger Exemp.* Finance Docket No. 31106, 52 F.R. 35334 (Sept. 18, 1987).

Pursuant to Section 11347 of the Interstate Commerce Act (49 U.S.C. s. 11347), the ICC imposed its standard *New York Dock* labor protective conditions on the Chessie-Seaboard consolidation and subsequent merger exemption (*New York Dock Ry. — Control — Brooklyn Eastern District*, 360 I.C.C. 60(1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979).

A. *THE JACKSONVILLE CONSOLIDATION*

As part of its implementation of the consolidation authority conferred upon it by the ICC, the Carrier served notice on the Organization on September 1, 1987 that on or after May 2, 1988 it would transfer and consolidate train dispatching functions throughout its system into a single centralized train dispatching operation headquartered at Jacksonville, Florida. Pursuant to Article I, Section 4(a) of *New York Dock*, the Carrier and the Organization signed an Implementing Agreement for this consolidation on January 9, 1988.

Approximately 420 members of the Organization in 13 States were affected by the Jacksonville consolidation. In determining whether an individual was entitled to receive a "displacement allowance" under Article I, Section 5(a) of *New York Dock*, and for other purposes, the Carrier was required to compute the employee's "average monthly compensation".

Article I, Section 5(a) reads as follows:

Displacement Allowance.- (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall during his protective period, be paid a monthly displacement allowance equal to the differrence between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed service immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period) and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position. [Emphasis in Text]

The parties are in fundamental disagreement with respect to the computation of the "average monthly compensation" under Section 5(a). In its simplest terms, the Carrier contends that the compensation must be adjusted to exclude any extraordinary overtime earnings attributable to the Jacksonville transaction itself, while the Organization contends that the literal terms of Section 5(a), i.e., "total compensation received", do not allow for such an exclusion.

In attempting to resolve the fundamental dispute, the parties have agreed that this Arbitration Committee should resolve a specific dispute involving the calculations made for Barr, a displaced employee formerly employed as a Train Dispatcher at the now-closed Evansville, Indiana train dispatching facility. The resolution of this specific claim will then provide guidance to the parties in resolving a large number of similar disputes on the property.

B. *THE CLAIM OF JOHN P. BARR*

The train dispatching facility at Evansville was closed on June 18, 1988 as part of the consolidation of operations into Jacksonville, and train dispatcher Barr reverted to the basic craft of Clerk pending recall to a Train Dispatcher position at Jacksonville, thus becoming a displaced employee entitled to *New York Dock* protection.

For a period of time before and after the Evansville closing, Barr was utilized to protect the vacancies of other dispatchers at Evansville who were either in training or being transferred to Jacksonville. He was also utilized to fill in at other train dispatching locations on the property for dispatchers who were in training or being transferred. This resulted in substantial amounts of overtime, as well as reimbursement for travel and living expenses incurred while away from his headquarters location.

As stated by Barr in a letter to a Carrier official dated February 2, 1989:

Because so many dispatchers were out of the office, learning the new dispatching system, reviewing territory, etc., I worked 7 days a week from about March 1st until the office was closed on June 17, 1988.

On February 10, 1989 the Carrier advised Barr that his displacement allowance "Test Period Average", or "TPA" (the term used to denote "average monthly compensation" under Section 5(a)) was $3,163.14 per month based on 174 average hours per month, and that his protective period commenced on June 18, 1988 and would run for the 6-year period ending June 17, 1994. Barr and the Organization disputed the Carrier's computation of his TPA. (The Organization correctly notes in its Post-Hearing Brief that it also disputes the date of commencement of Barr's protective period, and that this is an issue to be resolved separately between the parties; see Ex. TD-6E, *ATDA Initial Submission*).

The Carrier computed Barr's TPA in the following manner:

(1) During the 12-month period immediately prior to his displacement on June 18, 1988, Barr's average monthly earnings were $3,338.94 and average hours were 183.67 (for calculation purposes throughout, all hours are expressed in straight time; thus 8 hours of overtime would be expressed as 12 straight-time hours). This worked out to average hourly earning of $18.18 per hour for the 12-month period. ($3,338.94 divided by 183.67 = $18.18).

(2) During the 8-month period immediately prior to the commencement of training for the consolidation, i.e., the period from June 1, 1987 to January 31, 1988, Barr's average earnings were $2,896.49 per month and average hours were 174. This resulted in a difference in average hours of 9.97 (183.67 - 174 = 9.67).

(3) The 9.67 difference in monthly hours was then multiplied by the previously calculated hourly rate of $18.18, yielding a figure of $175.80 (9.67 X $18.18 = $175.80).

(4) the $175.80 was then deducted from $3,338.94 in arriving at the TPA of $3,163.14.

The organization contends that $3,338.94 is the correct amount for purposes of Section 5(a). The Carrier contends that $175.80 of the amount represents transaction-related overtime and should be excluded.

C. OTHER PROCEEDINGS

As the Barr claim and a number of other individual claims remained pending in an uncertain status on the property, the Organization filed a complaint with the ICC on October 31, 1989 alleging that the Carrier had not properly computed "average monthly compensation" amounts for employees affected by the Jacksonville transaction under the ICC's *New York Dock* conditions.

In a decision dated June 25, 1990 (Finance Docket No. 28905, Sub - No. 24), the ICC declined to take jurisdiction, stating that "We have been reluctant to intrude into the field of claims resolution, an area that has traditionally been deferred to arbitrators . . . ", and concluded, "We agree with CSX that this dispute should be submitted to arbitration under Article I, Section 11 of *New York Dock*. Consistent with *Lace Curtain*, the Arbitrator can address this question in the first instance. The appellate remedy before us ensures consistency with *New York Dock*.

The ICC subsequently denied the Organization's petition to reopen and reconsider in an order dated November 9, 1990.

In *American Train Dispatchers Association v. Interstate Commerce Commission*, 949 F.2d 413 (D.C. Cir. 1991), the U.S. Court of Appeals denied the Organization's petition for review of the ICC's order, holding:

We conclude that the Union seeks judicial review of a non-final order of the ICC, which we have no jurisdiction to grant. After an Arbitrator decides this dispute in the first instance, the Union may seek ICC review of the Arbitrator's decision . . . If the Union petitions for review of any final order that the agency may then issue, it may be heard at that time on the merits of its claim that the ICC improperly remitted it to arbitration. (414,415)

During the pendency of the proceedings before the U.S. Court of Appeals, the Organization by letter of April 3, 1991 notified the Carrier that it was referring "our dispute as to whether CSXT has correctly computed the 'average monthly compensation' " to an Arbitration Committee under Article I, Section 11 of *New York Dock*, and on June 18, 1991 requested the National Mediation Board to appoint a neutral member. Following appointment of the neutral member on August 6, 1991, the proceedings of this Arbitration Committee were held in abeyance until the judicial proceedings were completed.

IV. JURISDICTIONAL AND PROCEDURAL ISSUES

Numerous procedural and jurisdictional issues were raised by both parties in the Pre-Hearing Briefs, several of which were resolved at an initial Executive Session of the Committee.

The most important procedural agreement reached was to allow the claim of Barr to be resolved by the Committee, thus clearing the way to use that claim as a vehicle for resolving the fundamental dispute between the parties.

Although the Carrier has insisted on several of its procedural and jurisdictional objections in its Post-Hearing Brief, most of these have become either moot or unnecessary to resolve in light of the procedural agreement reached.

This leaves the question of whether the Carrier is correct that the Organization is barred from pursuing this claim by the doctrine of Laches.

Although the claim has a lengthy history and the Carrier asserts that the Organization has been "forum-shopping" in this matter, the Committee would observe that the organization has the right to attempt to advance the interests and secure the rights of its members through all legitimate avenues. It has vigorously pursued its legal and quasi-legal remedies at every stage of this dispute, and the consequent time delays cannot be said to fall within the ambit of the traditional doctrine of Laches.

We therefore find that there are no jurisdictional or procedural obstacles to moving forward to a resolution of this dispute.

V. *POSITIONS OF THE PARTIES*

A. *THE ORGANIZATION'S POSITION*

The Organization argues that Article I, Section 5(a) requires the Carrier to include *total* compensation and *total* time paid for in the 12-month period *immediately* preceding the date of an employee's displacement.

The Organization asserts that the Carrier used an 8-month test period which was well outside of the 12-month period immediately prior to the displacement of Barr and most other Train Dispatchers. It made no attempt to identify overtime specifically performed in connection with the instant transac-

tion, but rather assumed that any overtime beyond that during the 8-month period was for the transaction. The use of the earlier 8-month period effectively deprived Barr of most of the overtime and premium earnings which accrued in the 12-months period prior to his displacement.

The terms of Article I, Section 5(a) are specific. *Total* compensation during the pre-displacement 12-month period is to be used. Such a rule may result in inequities; for example, an employee may be ill during part of the period, or there may be an economic recession. On the other hand, in anticipation of a coordination, a carrier may curtail hiring with the result of considerable overtime. But the rule is pragmatic and arbitrary, and avoids numerous disputes as to the fairness of an individual's average monthly compensation.

The virtue of such certainty and even-handedness was recognized by *Arbitration Board No. 284* (Arbitrator Francis Robertson; Brotherhood of Ry. & Airline Clerks/Western Md. Ry. Co., 9/9/64), and the Committee should be guided by that decision in the instant case.

Finally, the Organization argues, Train Dispatchers are *required* to perform overtime by virtue of the existing Agreement. There is no voluntary "windfall" for Train Dispatchers, unlike other rail carrier employees in other crafts. Accordingly, even if overtime work was to an extent performed because of the transaction, such was performed in the ordinary contract administration of Train Dispatcher duties.

B. *THE CARRIER'S POSITION*

The Carrier points out first that it has not relied on a "test period" other than the 12-month period preceding implementaton of the transaction. The only reason that a period of time prior to the "test period" was reviewed was for the purpose

of comparison to determine whether the actual "test period' contained extraordinary transaction-related service. The comparison period could have been any period of time so long as it was of sufficient length and did not incorporate any transaction-related activities.

In the specific claim in dispute here, the Carrier has shown that Barr's increased earnings were directly related to implementation of the transaction. Barr admitted this himself since he predicated his contentions on his extraordinary and extended service as a Train Dispatcher associated with implementation of the transaction.

The issue of whether "average monthly compensation" must be adjusted to reflect transaction-related overtime and other extraordinary payments has been settled for years. The Committee has been furnished with numerous Awards by Arbitrators from a long line of precedent in support of its position.

These Awards reflect the common-sense rationale that earnings which would not have accrued to the employee, in the absence of the Carrier's implementation of the transaction, would constitute a "windfall" multiplied by the number of years in the employee's protective period.

The Carrier therefore asks the Committee to deny the claim of Barr and reaffirm the long-settled practice in the railroad industry that transaction-related overtime and other extraordinary payments must be excluded when computing "average monthly compensation" under *New York Dock*.

VI. DISCUSSION

A. *HISTORY OF THE COMPUTATION PROVISION*

We turn first to a review of the history of employee protective arrangements in the railroad industry, and in particular the computation provision for displaced employees.

In the early 1930's the railroad industry, with a workforce then of approximately 1.6 million employees, began a long process of mergers, coordinations of facilities, abandonments, service discontinuances, and technological and organizational changes which, as the history of this dispute discloses, has not only continued into the present time but has to a degree accelerated with the introduction of technological leaps such as the Carrier's centralized computer-assisted train dispatching facility in Jacksonville. As a result of these and other factors, the workforce in the industry has gradually declined to a level well under 300,000.

On May 21, 1936 the initial framework for protective arrangements for employees adversely affected by these changes was put in place by means of a collective bargaining agreement between 85% of the nation's carriers and 20 of the 21 railroad labor organizations, subsequently referred to as the Washington Job Protection Agreement (hereinafter "WJPA"). The WJPA provided certain protections for employees who lost their jobs or were otherwise adversely affected by their employment as a result of a "coordination".

Among the protections was a displacement allowance for an employee who was retained in service but who, because of the coordination, was placed "in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination" (WJPA, Section 6(a)). The method for computing the displacement allowance is found in Section 6(c) of WJPA, and, as pertinent to our purposes, is essentially identical to the language found in Article I, Section 5(a) of the ICC's current *New York Dock* conditions.

Section 6(c) of WJPA reads in pertinent part as follows:

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by

the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve months being hererinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for . . .

Following the agreement reached on WJPA, the ICC held that it was empowered to prescribe "just and reasonable" conditions for the protection of employees in merger cases (233 I.C.C. 21). This authority was upheld by the Supreme Court in *U.S. v. Lowden,* 308 U.S. 225 (1939).

The Transportation Act of 1940 (54 Stat. 906) added Section 5(2)(f) to the Interstate Commerce Act (now recodified and previously cited in this Opinion as 49 U.S.C. s.11347), mandating employee protection in rail mergers and consolidations requiring ICC approval. The protective arrangements could be devised by agreement of the parties to these transactions and frequently were; otherwise the ICC was required to prescribe them.

A review of the major protective provisions prescribed by the ICC and imposed on the parties over the years pursuant to this statutory authority demonstrates that, while various alterations were made to the entire package of employee protective arrangements provided under WJPA, the specific provision concerning the computing of displacement allowances remained essentially unchanged (See, for example, the *Oklahoma Conditions,* 257 I.C.C. 177(1944); the *New Orleans Conditions,* 267 I.C.C. 763(1948), 282 I.C.C. 271(1952); the *Southern Central of Georgia Conditions,* 317 I.C.C. 557 (1962), 317 I.C.C. 729(1963), and 331 I.C.C. 151(1967)).

Section 405(c) of the Rail Passenger Service Act of 1970 (45 U.S.C. s.565) mandated protective conditions for

employees affected by the establishment of AMTRAK. These conditions were devised by the Secretary of Labor and imposed as Appendix C-1 on each AMTRAK train discontinuance contract with carriers; hence they were called the *Appendix C-1 Conditions*. While differing in some respects from previously-noted ICC-prescribed conditions, the specific provision we are concerned with was included essentially unchanged.

In 1976, in the legislation establishing Conrail, the Railroad Revitalization and Regulatory reform Act of 1976 (90 Stat. 62), the Interstate Commerce Act was amended so as to in effect require the ICC to prescribe a new set of protective conditions which included the *Appendix C-1 Conditions*. This led directly to the ICC's adoption of the *New York Dock* conditions in 1979 and the previously-cited Article I, Section 5(a).

In a decision upholding the ICC's new conditions, *New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir. 1979), the Court, after noting that WJPA "generally is conceded to be the blueprint for all subsequent job protection arrangements" (p.86), summarized the ICC's action as follows:

Briefly, the ICC, in formulating the "New York Dock conditions" selected the most favorable of the labor protective provisions contained in both the "New Orleans conditions" (as clarified in Southern Control II) and the Appendix C-1 conditions.

Thus, in the journey from WJPA in 1936 to the proceedings before this Committee, the language found in Article I, Section 5(a) of *New York Dock* concerning the computation of displacment allowances has stayed essentially the same.

We turn then to a review of previous decisions of Arbitrators construing this language over the years.

B. *DECISIONS BY ARBITRATORS*

The term "total compensation", first appearing in Section 6(c) of WJPA, has inherent ambiguities, and has never been addressed during the many legislative and administrative developments previously discussed. Clarification of its meaning with respect to numerous issues has thus been left to Arbitrators on a case-by-case basis.

The Award of *Arbitration Board No. 284* (Arbitrator Francis Robertson; Brotherhood of Ry. & Airline Clerks/Western Md. Ry. Co., 9/9/64) has been cited by the Organization in support of its contention that the term should be interpreted literally. That Award, which construed the ICC's *Oklahoma Conditions*, held as follows:

To determine what amount of compensation would be protected it is clear that the Commission adopted a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employeee and at times against the Carrier. For example, during the twelve months immediately preceding displacement an affected employee might have experienced a long period of illness and the amount of his "protected" compensation would be substantially affected by operation of the formula. On the other hand, perhaps in anticipation of an abandonment, the Carrier may have curtailed its hiring with the result that considerable amounts of overtime would be worked during the test period. We cannot believe that the Commission was blind to these factors.

While this Award is readily distinguishable on the facts from the present case, some other early Awards by Arbitrators did interpret the language literally, resulting in a number of contradictory Awards on the issue.

The WJPA Section 13 Disputes Committee, however, in Docket No. 62 and Docket No. 137, did not apply the literal

interpretation, holding in Docket No. 137 that:

In computing test period averages, it is proper to exclude overtime earnings in excess of average overtime directly attributable to increased pre-coordination work opportunities caused by the impending coordination.

These cases were discussed by Arbitrator Irwin Lieberman in a 1982 Award construing an Implementing Agreement under WJPA (ATDA/Baltimore & Ohio RR Co., 5/6/82). Arbitrator Lieberman first distinguished the Award of *Arbitration Board No. 284:*

An examination of Arbitration Board No. 284's decision with respect to a related issue indicates significant differences in the factual background. In that case, in which the Board affirmed the Organization's position, it is clear that the Claimant worked on other assignments which flowed from his status prior to displacement. Thus, his earnings during the test period were attributable to his employment status in the primary job prior to his displacement. There is no indication that the earnings which were excluded were as a direct result of the abandonment of the operation itself. Thus, the circumstances involved in that case are distinct and different from those involved herein and do not provide an applicable precedent for the resolution of this dispute.

He then continued:

The Board notes that in the Section 13 Committee's Docket No. 137, the same principle was upheld as indicated in Docket No. 62. The Board in Docket No. 137 reaffirmed the principles it had enunciated in the earlier decision. The Board stated in the second case that it was sound to test adverse affect in part by comparing test period average earnings with post coordination actual earnings and to treat a deficit as presumptively the result of a coordination. The Board went on

in that case to point out that the Agreement, with respect to the coordination, was designed to protect employees against reduction of their *normal* earnings. . . [Original Emphasis]

While recognizing the Organization's argument with respect to the literal and clear meaning of the words involved in the Agreement, the Board must note that this same language has been interpreted consistently following the two Section 13 Awards referred to heretofore. The Board is not persuaded that the Section 13 Committee reasoning should be overturned.

Thus, the Board must conclude that there is no basis for perpetuating the abnormal and truly windfall overtime earnings which the three Claimants accrued during the six month period immediately preceding the coordination for a five year period. Such a perpetuation of windfall earnings would be contrary to the intent of the Washington Job Protection Agreement philosophy and the entire purpose for protection of earnings as this Board views it.

In a more recent case directly construing the *New York Dock* conditions (transportation Communications Union/Missouri Pacific RR, 3/1/88), Arbitrator John LaRocco held as follows:

While test period average earnings cannot be computed solely with straight time earnings, the term "total compensation" in protective arrangements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language. As the Section 13 Dispute Committee ruled, excessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction. Regular overtime, recurring overtime

or casual overtime attached to any assignment is properly included within the test period average earnings.

Arbitrator LaRocco went on to explain the rationale for the exclusion:

The narrow exception, which excludes only one type of overtime, is designed to prevent employees from profiting from the transaction. Excessive overtime earnings arising directly from the transaction would not have otherwise accrued to the employee if the Carrier did not implement the transaction. In such instances, the employee would obtain a windfall multiplied by the number of years in his protective period. Whether any overtime which an employee earns during this test period should be included or excluded from the Section 5(a) formula must be decided on a case by case basis using the guidelines discussed above.

The Committee also notes recent decisions in accord construing a National Agreement between the parties (LaRocco; ATDA/Burlington Northern RR Co., 1/9/87), and the *Appendix C-1 Conditions* (LaRocco; Transportation Communications Union/Burlington Northern RR Co., 12/17/90).

The Organization cited only one recent Award which departed from this line of authority, a case involving the *Appendix C-1 Conditions* (Arbitrator John Willits; International Brotherhood of Electrical Workers/Burlington RR Co., 10/10/91). Arbitrator Willits found the language in question to be "straight forward language" which "must be given great weight and precludes subseuqent alteration through the Arbitration process." He concluded:

In spite of existence of some contradictory awards which exclude certain overtime from the term "total compensation", this Committee is guided by the principle enunciated in *Eg., United Paperworkers International Union v. Misco, Inc.*

484 U.S. 29, 38 (1987), in which it was held that an arbitrator cannot "ignore the plain language of the contract".

On the totality of the entire record, we are compelled to make an Award in favor of the Organization. The Committee is bound to apply the literal language, with no exceptions, of Appendix C-1, Article 5(a) of the National Rail Passenger Service Act of 1970 (P.L. 91-518, as amended by Section 7-A, 1972 - P. L. 92-316. [SIC]

This Award, which essentially dismisses out of hand all previous arbitral decisions on the subject, appears to be an aberration and the Committee gives it little weight.

It can thus fairly be stated that the preponderance of decisions by Arbitrators requires that transaction-related overtime should be excluded from the computation.

VII. *FINDINGS AND CONCLUSIONS*

After a review of the extensive record developed in this case, including the proceedings before the ICC and the U.S. Court of Appeals, and having reviewed the history of the computation provision and decisions by Arbitrators construing it, the Committee finds that the Carrier correctly adjusted Barr's "average monthly compensation" to exclude extraordinary overtime earnings attributable to the Jacksonville transaction, and that the claim of Barr must therefore be denied.

While we have carefully considered the Organization's contention that a literal reading of Article I, Section 5(a) would result in certainty, even-handedness, and the avoidance of numerous disputes, we are persuaded that the underlying rationale followed by most Arbitrators who have ruled on this issue is a sound one, i.e., that the purpose of employee protective provisions is to protect an employee's normal earn-

ings, but not to present an opportunity to obtain a windfall for the entire protective period.

In the specific case of Barr, he admitted that he worked seven days per week for several months as a direct result of other dispatchers being in training or having been transferred to Jacksonville, making his earnings for that period unrepresentative of his normal earnings. Had the Jacksonville transaction not occurred, he may have earned regular, recurring or casual overtime but, as demonstrated by a review of the comparison period properly used by the Carrier, not this amount of extraordinary overtime.

Having examined the long history which led to the adoption of the *New York Dock* conditions, we are persuaded that to reflect this extraordinary overtime in a displacement allowance for a 6-year protective period would be fundamentally inconsistent with the basic protective purposes of the Conditions. Whether he volunteered or was required to perform this overtime work has no bearing on the question of properly determining what his normal earnings were for protective purposes.

The Committee thus concludes that there is no reason to depart from the great weight of arbitral authority on the issue presented, and the claim must accordingly be denied.

AWARD

The claim is denied.

/s/ George J. Nixon, Jr.
George J. Nixon, Jr.
Organization Member
See attached dissent.

/s/ Brenton C. Massie
Brenton C. Massie
Carrier Member

/s/ Hugh G. Duffy
Hugh G. Duffy
Chairman and Neutral Member

Dated: August 31, 1992

DISSENT OF ORGANIZATION MEMBER

The majority has misperceived this case as involving a dispute over the method for calculating displacement allowances (*Opinion*, pp. 1, 21), and that the parties agreed that the "claim" of Train Dispatcher J.P. Barr is to be the guideline in resolving a large number (approximately 250) similar disputes in Phase I of CSXT's coordination of train dispatching at Jacksonville, FL. (*Opinion*, pp. 5, 9).

The opinion is procedurally unfair, and constitutes egregious error. The case does not involve the calculation of displacement allowances, ***per se*** — none of the questions presented by either CSXT or ATDA even mentioned the term "displacement allowance."[1]

J. P. Barr's letters (Exh. TD-6B, 6D), cited by CSXT, do not constitute a "claim" for a displacement allowance, and the opinion elsewhere recognizes that such would be premature (*Opinion*, p. 6). Moreover, the majority has not accurately computed the "average monthly compensation" for J. P. Barr, even though ATDA apprised the Committee of CSXT's arithmetical error at the hearing. (Hearing Exh. No. 6).

The parties presented illustrative examples. ATDA brought forth the situation of Train Dispatchers Lenox Hacker and J. P. Allen, whereas CSXT mentioned that of J. P. Barr. These were the three illustrative examples, and the only fully discussed examples, in this record or in that before the ICC in its FD No. 28905 (Sub-No. 24), and before the U.S. Court of Appeals. *ATDA v. ICC*, 949 F.2d 413. CSXT reduced Hacker's average monthly compensation ("TPA") from his

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[1]The opinion refers to the parties' pre-hearing filings as "briefs" (*Opinion*, pp. 1, 8), whereas the parties understood their filings to constitute evidentiary submissions or presentations, and they were so labeled.

actual $5,069.59 per month to a lesser $3,538.29, which approximated and was based upon his earlier $3,460.62 TPA for an 8-month period that ended well over a year before he was first affected, and CSXT reduced that for J. P. Allen from his actual $4,981.12 TPA to a lesser $3,639.28, which approximated and was also based upon his earlier $3,564.66 TPA for an 8-month period that ended well over a year before he was first affected. (ATDA Subm. pp. 7-9).

The opinion finds that J. P. Barr's average earnings for the 8-month period was $2,896.49 based upon 174 hours, which CSXT raised to $3,163.14. (*Opinion*, pp. 6-7). But ATDA pointed out that CSXT did not correctly calculate the earnings for the 8-month period, which were $3,129.38. In short, Mr. Barr received virtually nothing. (HE-6, line 9)[2]

The parties did not agree to limit illustrative examples to that of J. P. Barr, which the majority has egregiously erred in simple arithmetic. Fairness required the majority to include all of the examples of unfair monthly compensation statements developed by the record, including those presented by ATDA, and not limited to CSXT's false computations for J. P. Barr.

The majority's opinion goes beyond fundamental unfairness and false calculations. The majority rules that actual time paid for in the 12-month period prior to displacement is to be ignored, in favor of actual time paid for during an earlier 8-month period (June, 1987-January, 1988). This use of hours paid for in an earlier 8-month June, 1987-January 1988 period, is directly contrary to the precise wording of the *New York Dock Conditions* ("NYD"), Article I, Section 5(a), which speaks of *total compensation received* and *total time paid for* during the last

[2]*See*: Exh. TDE-6F, CSXT's worksheet for J. P. Barr. He earned $3,129.35 for 175.25 hours. CSXT's use of 174.00 hours, such an arithmetically figure (Exh. TD-6A; CSXT Exh. C), perhaps alerted the majority to alter this to 174 hours, whereas all other data is developed to two decimal points. (*Opinion*, pp. 6-7).

12 months immediately preceding the date of an employee's displacement.

Finally, I dissent from the finding of the majority that whether the overtime was required or voluntary has no bearing upon determining average monthly compensation. (*Opinion*, p. 21). Compulsory overtime is not "windfall" earnings, but can be a strain upon a Train Dispatcher, with enormous added value to the carrier. The cited arbitration awards relied upon by the majority do not state that the nature of the overtime is irrelevant; to the contrary, it is of vital importance. The majority simply failed to understand or to appreciate the nature of the railroad industry.[3]

The majority has departed from the literal language adopted by the framers of the WJPA and the NYD, and instead slavishly followed other similar erroneous opinions, without drawing essence from the pertinent language under interpretation, thereby dispensing its own style of labor relations and justice.

I dissent.

/s/ George J. Nixon, Jr.,

George J. Nixon, Jr.,
Organization Member

[3]For example, the majority's statement that approximately 1.6 million persons were employed in the railroad industry in the early 1930's, when the industry began a long process of mergers, coordinations, etc. (*Opinion*, p., 13) is way off the mark. The industry had an average workforce of 1,052,738 during the period 1931-35, and 1,026,796 during the period 1936-40. Railroad employment increased dramatically in World War II, and was an average of 1,289,987 during 1946-50, and 1,166,379 during 1951-55. *Source:* AAR *Yearbook of Information* (1958 ed.) The major railroad mergers did not begin until sometime well after World War II. I appreciate that the Chairman-neutral member of the Committee may be a novice to the railroad industry, and to rail labor issues, but such should not excuse the carrier member.